

IN THE

15
Supreme Court of the United States

U. S. Supreme Court, U. S.

FILED

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CHARLES ELIOTT CHAPLEY
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October Term, 1943. No. 691

THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES, Trustee
Under Trust Agreement Dated August 9, 1933, as Supple-
mented, With CAPITAL SAVINGS PLAN, INC., and the
Holders of the Contract Certificates Issued Thereunder,

Petitioner,

v.

UNITED STATES OF AMERICA.

October Term, 1943. No. 692

THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES, Trustee
Under Trust Agreement Dated July 15, 1934, With WEL-
LINGTON FOUNDATION, INC., and the Holders of the
Certificates Issued Thereunder,

Petitioner,

v.

UNITED STATES OF AMERICA.

ITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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IN THE
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October Term, 1943. No.

THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES, TRUSTEE
UNDER TRUST AGREEMENT DATED AUGUST 9, 1932, AS
SUPPLEMENTED, WITH CAPITAL SAVINGS PLAN,
INC., AND THE HOLDERS OF THE CONTRACT CERTIFICATES
ISSUED THEREUNDER,

Petitioner,

v.

UNITED STATES OF AMERICA.

October Term, 1943. No.

THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES, TRUSTEE
UNDER TRUST AGREEMENT DATED JULY 15, 1935, WITH
WELLINGTON FOUNDATION, INC., AND THE HOLD-
ERS OF THE CERTIFICATES ISSUED THEREUNDER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, as trustee under the respective trust agreements above mentioned, respectfully prays that writs of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit to review the judgments and decisions of that court entered in these cases on November 16,

1943 affirming judgments of the District Court of the United States for the Eastern District of Pennsylvania.

Opinions Below.

The opinions of the United States District Court for the Eastern District of Pennsylvania (R. 30 and 61) are reported at 48 F. Supp. 873 and 48 F. Supp. 875. The Circuit Court of Appeals for the Third Circuit filed one opinion covering both cases (R. 65) which is reported at 138 Fed. (2d) 869.

Jurisdiction.

Jurisdiction to issue the writs prayed for is vested in this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C., Title 28, Section 347). The judgments of the United States Circuit Court of Appeals for the Third Circuit to be reviewed were entered November 16, 1943. (R. 75-76)

Statement of Questions Involved.

1. Were the trusts involved in these cases, which are of type commonly known as periodic payment plan trusts, properly classified as associations for federal tax purposes?
2. Were these trusts created and maintained for the purpose of holding and conserving property with incidental powers or for the purpose of carrying on business enterprises and sharing their gains?
3. Is the purpose for which trusts were created and maintained the primary test or do the tests of corporate advantages and corporate resemblances control?
4. Did the Circuit Court construe the word "associations" in the Revenue Acts and Internal Revenue Code in its ordinary and literal sense or did it extend its meaning beyond the clear import of the language used?

Statutes Involved.

The Statutes involved are Section 1001 (a) (2) of the Revenue Act of 1936 (49 Stat. 1756, U. S. C. A., Title 26, Internal Revenue Acts, page 971) and Section 901 (a) (2) of the Revenue Act of 1938 (52 Stat. 583, U. S. C. A., Title 26, Internal Revenue Acts, page 1161), which read:—

“(a) When used in this Act—

* * * * *

“(2) The term ‘corporation’ includes associations, joint stock companies, and insurance companies”.

In the Wellington case there is also involved Section 3797 (a) (3) of the Internal Revenue Code (53 Stat. 469, U. S. C. A., Title 26, Section 3797 (a) (3)), which reads:—

“(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

“(3) Corporation. The term ‘corporation’ includes associations, joint stock companies, and insurance companies”.

Statement of Matter Involved.

These cases are suits instituted by the petitioner, a Pennsylvania trust company, as trustee under two trust agreements, to recover refunds of federal capital stock and corporate income taxes paid pursuant to a ruling (R. 26) of the Commissioner of Internal Revenue that certain trusts administered by it were associations.

The ruling applied to thirteen trusts, of a type generally known as “periodic payment plan trusts”. Eleven suits against the respondent were instituted in the District Court for the Eastern District of Pennsylvania. These two cases were selected for trial as typical cases to test the validity of the ruling.

The taxes which the petitioner sought to recover in its complaints were:— in the case of the Capital trust, corporate income and excess profits taxes and undistributed profits surtax for the calendar year 1936, corporate income taxes for the calendar year 1937, and capital stock taxes for the years 1935, 1936, 1937 and 1938; and in the case of the Wellington trust, capital stock taxes for the years 1937, 1938, 1939 and 1940 and corporate income tax for the calendar year 1940.

The facts were stipulated. (R. 2, 38) The Appendix filed with the Circuit Court, which is part of the printed record before this Court, contained the stipulations of fact exclusive of the trust agreements. (R. 12, 47) These were furnished to the Circuit Court at the argument in an exhibit book which has been certified to this Court as part of the unprinted record. For the convenience of this Court the petitioner has printed in an appendix hereto annexed, the Capital trust agreement complete with exhibits and supplements, the important portions of the Wellington trust agreement and one of the forms of certificate issuable thereunder.

The periodic payment plan is a program designed to enable the so-called "investor" to accumulate a diversified investment through the purchase of the shares of a designated investment trust or investment company. There is issued to the investor a certificate by the acceptance of which he agrees to make regular periodic payments. The most usual program is \$10. a month for ten years. (R. 3, 39) All payments are made to a bank or trust company as trustee. The trustee is authorized to make certain deductions from payments. For instance, in the Capital Plan (R. 4) the authorized deductions are (1) 25¢ for each \$10 payment for the trustee's fee; (2) \$60 to Capital Savings Plan, Inc., the sponsoring company, deducted from the first twelve monthly payments or such of them as it should direct; and (3) in case the investor elects to subscribe for

a certificate with insurance benefits, his share of the premiums payable under a group life insurance policy insuring his life in the amount of his unpaid payments, so that in case of his death the insurance may be collected and his certificate may become fully paid.

After the trustee has made the authorized deductions it invests the balance in the shares which are to be purchased under the plan. (R. 4, 40) It keeps a separate account for each investor in which it notes the exact amount of shares calculated to the third decimal place which it purchases each time with the investor's money, and a share balance carrying forward the total number of shares purchased and held for each investor at any one time. (R. 13, 49)

When the investor has completed his payments, he may require the trustee to hold his trust shares for him for an additional period of ten years in the case of Capital plan, and until the expiration of 25 years from the date of his certificate in the case of the Wellington plan. (R. 68) An investor may also subscribe for a fully paid plan, in which event, he makes one large initial payment. The investor can compel the trustee to administer a Capital fully paid plan for ten years and a Wellington fully paid plan for twenty-five years.

Neither the trustee nor the sponsoring company may terminate a plan unless (1) the investor under the periodic payment plan becomes delinquent in making his payments (R. 68) or (2) until the expiration of the various periods for which the plans must be administered. The investor, on the other hand, has the right at any time to terminate his plan and receive his trust shares or the proceeds thereof. (R. 5, 42) He may also make periodic partial withdrawals from time to time of his shares or the proceeds thereof. (R. 6, 42)

The shares purchased from time to time for the investors are held by the trustee registered in its name or in

the name of its nominee. (R. 6, 43) The trustee receives from time to time regular semi-annual or quarterly distributions or dividends on the shares, and either reinvests them in additional shares for each investor or remits them to each investor in accordance with their instructions or the terms of the trust agreements. (R. 5, 41) In the case of the Capital plan the trust agreement provides that the distributions received for investors holding periodic payment plans shall be reinvested, but the trustee with the approval of the sponsoring company in practice has permitted the holders of such plans to elect to receive their distributions in cash. (R. 5) The holder of a fully paid Capital plan may elect either to have his distributions reinvested or to have them remitted to him. In the case of Wellington plan, the dividends received on the shares are distributable to the investors, who have the right to direct that they be reinvested if they so desire. (R. 41)

The trustee maintains a separate income account for each investor (R. 23, 57) on which it notes the investor's share in money of each distribution or dividend received, and where reinvestments are made the number of shares carried to the third decimal place which are purchased for him. The shares purchased are also noted on the master card account kept for each investor and the share balance carried forward as in the case of the investment of payments.

The functions of the trustee are almost entirely ministerial. Its duties and responsibilities are set forth in detail in the trust agreements. The functions of the sponsoring company are to solicit the applications for the plans and to furnish the shares to be purchased thereunder as a dealer in securities. The only powers exercisable by the sponsoring companies or the trustee requiring the exercise of discretion are the powers of substitution of the investment which have never been exercised in either of the trusts. (R. 3, 39)

In the Capital trust the shares designated for purchase are Independence Trust Shares, which are the shares of an investment trust of the fixed or deposited unit type. (R. 69) The sponsoring company under Article VI of the trust agreement (Appendix p. 56) may substitute the shares of a similar fixed investment having reasonably comparable underlying securities, or if such shares are not available or their purchase is impracticable, receipts or certificates of interest issued by banks evidencing the deposit of reasonably comparable underlying securities, if in the judgment of the sponsoring company "such latter investment would be more beneficial to the Investor". The trustee under Sections 2 and 3 of Article VIII (Appendix p. 59) also has the power to substitute like shares, receipts or certificates of interest, if the shares then purchaseable cease to be available for purchase or can be purchased only at unreasonable prices, but the trustee can substitute only for those particular investors who consent in writing within thirty days after notice.

In the Wellington trust the shares designated for purchase are the shares of Wellington Fund, Inc., an incorporated investment company wholly separate and distinct from Wellington Foundation, Inc., the sponsor of the Wellington plans. (R. 69-70) The sponsoring company under Article VI of the trust agreement (Appendix p. 94) may substitute the shares of any investment trust incorporated or unincorporated having a portfolio of securities reasonably comparable to those in the portfolio of Wellington Fund, Inc., or in case such shares are not available or their purchase impracticable, such other shares as in the opinion of the sponsoring company will supply the investors with shares of reasonable security and income producing characteristics. If any substitution is made the investors are to be notified and are to have thirty days to dissent by terminating their plans. The trustee also has a power of substitution under Section 6.04 (Appendix p. 96), if the sponsoring company does not furnish an adequate source from

which shares can be purchased and does not substitute other shares, but here again the trustee cannot substitute as to any investor who does not consent in writing within thirty days.

Except in the very remote contingency under the Wellington plan that the trustee may become incapable of acting, it cannot resign its trusteeship under any plan once the certificate has been issued, nor can it be removed. (R. 68) The trustee keeps only such accounts as are necessary to administer the plans on a cash basis. (R. 8, 45) It keeps no capital or income account for the trusts as a whole. (R. 9, 46) The trusts have no office stationery, no minute books, and no seals, nor have the trusts any employees, officers or directors. There are no provisions in the trust agreements for meetings of the investors and no such meetings have ever been held. The investors have no voting rights with respect to the administration of the trusts. (R. 9, 46)

The District Court (R. 30, 61) held that the trusts were associations, and entered judgments for the respondent. (R. 35, 62) Upon appeal the Circuit Court also held the trusts were associations (R. 65), and affirmed the judgments of the District Court. (R. 75, 76)

Reasons Relied on for Allowance of Writs.

I. The Circuit Court has decided these cases in conflict with decisions of this Court in *Morrissey v. Commissioner*, 296 U. S. 344, and companion cases:

In the *Morrissey* case this Court adopted as the primary test to determine whether a trust is an association for federal tax purposes, that the trust must have been created and maintained as "a joint enterprise", or as "an enterprise for the transaction of business" (p. 356), or to provide "a medium for the conduct of a business and sharing its gains" as distinguished from an object "to hold and conserve particular property, with incidental powers". (p. 357) "The nature and purpose of the co-operative

undertaking will differentiate it from the ordinary trust." (p. 357)

The Circuit Court applied as the primary test, "the similarity of the benefits and privileges enjoyed by virtue of the trust when compared with those afforded by the use of the corporate forms". (R. 72) It also held that five attributes of corporate organization mentioned by this Court in the *Morrissey* case, were sufficient of themselves to characterize a trust as an association, viz. (1) a continuing entity to hold title, (2) centralized management, (3) security from termination by death of the beneficial owners, (4) facilitation of transfer and the introduction of large numbers of participants and (5) limited liability. (R. 72)

This Court in the *Morrissey* case did not intend that corporate resemblances should be a primary test. The five attributes were mentioned merely to illustrate features which are to be found in trusts as well as in corporation. Attributes 3 and 4 were mentioned as distinguishing features as between partnerships on the one hand and trusts and corporations on the other hand.

The Circuit Court also erroneously found that all five attributes were present in the trusts here involved. Attributes 2 (central management) and 5 (limited liability) were not present in the sense this Court intended in the *Morrissey* case. It is also doubtful whether attribute 1 (a continuing entity to hold title) is present in the sense contemplated.

The tests applied by the Circuit Court lead to the classification of a trust as an association for technical and superficial reasons and avoids the basic question of whether the trust is an association in the literal and ordinary sense; whether it really is a "business trust". The petitioner will expand its argument under this heading in its brief, and will cite well reasoned decisions of other Circuit Courts and lower federal courts which correctly apply the primary test of the *Morrissey* case.

II. The Circuit Court has failed to construe the term "associations" in the tax statutes involved in accordance with the rules of statutory construction announced by decisions of this Court.

This Court has held in a number of cases, of which the one most often cited is *United States v. Merriam*, 263 U. S. 179, that taxing statutes are not to be extended by implication beyond the clear import of the language used and that doubt as to the meaning of their words must be resolved against the government and in favor of the taxpayer. It has also held in *Croker v. Malley*, 249 U. S. 223, that a tax statute should not be construed so as to tax the same income twice unless the intent to do so be clearly expressed.

The Circuit Court stated the question involved to be "whether the trusts under consideration are pure trusts or associations" (R. 66), and defined "pure trusts" as "trusts of traditional pattern where property is conveyed by will, deed, or declaration to a trustee or is to be retained by the settlor on specified trusts for a certain term for the benefit of named or described persons". (R. 71)

Aside from the fact that the trusts here involved come within this definition in most respects, the issue is not whether a trust is a pure trust or an association, or as the respondent argued before the Circuit Court whether all trusts which are not pure trusts must be associations, but whether what is a trust in form and substance must be classed as an "association", using that term in its ordinary and literal sense and without extending its meaning by implication against the interests of the taxpayer.

The fallacy of the Circuit Court's position is demonstrated by the portion of its opinion which points out differences between these trusts and a "traditional trust". (R. 73-74) It stresses the ministerial functions of the trustee which negatives the attribute of central management. It points out that each investor may take down his interest in the trust at any time while the trustee remains help-

less. This negatives the attribute of continuity and is an attribute of revocable trusts which are taxed under Section 166 of the Internal Revenue Code.

The construction of the term "associations" applied by this Court in the *Morrissey* case is the only sound one. The primary test is whether the trust is in reality a business trust; that is a trust created and maintained for the purpose of conducting a business enterprise and sharing its gains. The petitioner will expand its argument under this heading in its brief.

III. The Circuit Court erred in holding that it was not the purpose of the trusts to achieve security and preservation of property.

This finding of the Circuit Court appears at page 74 of the Record. It is without foundation. The very purpose of the trusts is that the trustee shall hold and accumulate shares for each investor for long periods of time, subject to his right to revoke the trust to the extent of his earmarked interest therein, and subject to termination by the trustee only if an investor holding a periodic plan becomes delinquent in his payments. Security is afforded by lodging the investor's shares in the hands of a responsible trust company. The petitioner will expand its argument on this point in its brief.

IV. The Circuit Court failed to hold that the investors were not associates.

This Court stated in the *Morrissey* case (p. 356) that the word "association" implies "associates", and carried the thought forward by constant references to a "joint enterprise" or "common enterprise". The most unusual feature of the trusts in these cases is that in one sense there is a separate trust for each beneficiary. This arises from the fact that the trustee is required to keep a separate account for each investor and to earmark upon its books the exact amount of shares held for each investor. At any one time each investor has a complete equitable in-

terest in a certain number of shares held for him and for no one else. He is concerned only with how the trustee applies his payments and the dividends upon his shares. He is not concerned in the slightest with how the trustee applies the payments or dividends of any other investor.

The petitioner will expand its argument on this point in its brief.

V. The Circuit Court has decided an important question of federal law which has not been, but should be, settled by this Court.

The periodic payment plan trusts administered by the petitioner are not the only trusts in the country which may be affected by the decision of the Circuit Court. An indication of the number of trusts of this type there are throughout the nation is the fact that 54 periodic payment plans are registered with the Securities and Exchange Commission under the Investment Company Act of 1940, and that approximately 400 investment trusts, investment companies, face amount certificate trusts and periodic payment plans in all are registered with the Commission. The periodic payment plans, therefore, represent a sizeable proportion of the general investment trust field.

At the present time the petitioner administers plans for some 20,000 investors all of whom are adversely affected by the decision of the Circuit Court because it subjects them to double taxation upon the theory that the trusts are separate business entities taxable for federal purposes in the same manner as corporations. Judging from the number of investors for whom the petitioner acts and the number of periodic payment plans registered with the Commissioner, there are undoubtedly many more thousands of members of the investing public who would be likewise affected if the decision were to be universally applied as the law in all circuits.

The same or similar questions are pending in other federal jurisdictions. The petitioner is informed that there are two periodic payment plan trusts trustee by the Em-

pire Trust Company, of New York, with large claims for refund, on two of which suits are pending in the United States District Court for the Southern District of New York. An appeal is now pending before the United States Circuit Court of Appeals for the Tenth Circuit (*Commissioner v. The City National Bank and Trust Company, Trustee*) in which the Commissioner is endeavoring to reverse a decision of the Tax Court of the United States holding that a trust which is a combination of a periodic payment plan trust and a fixed investment trust is a trust and not an association.

The question involved is, therefore, important not only to the investors for whom the petitioner acts as trustee, but to holders of periodic payment plans throughout the nation.

WHEREFORE, it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals for the Third Circuit should be granted.

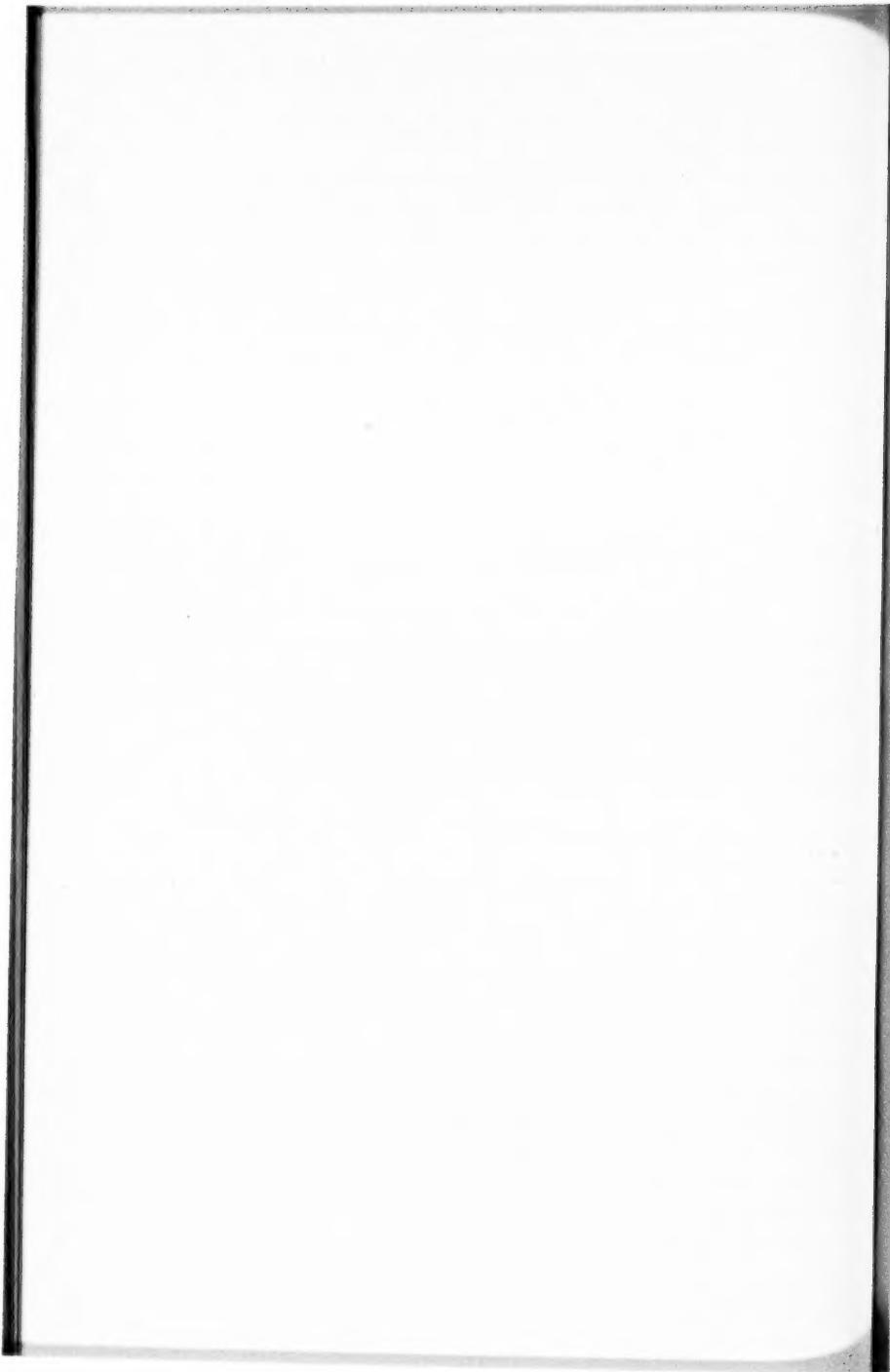
AND your petitioner will ever pray, etc.

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF
CERTIORARI.

OPINIONS BELOW.

A reference to the opinions below is set forth in the Petition at page 2 thereof.

JURISDICTION.

The grounds upon which the jurisdiction of this Court is imposed are set forth in the Petition at page 2 thereof.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

The Petition contains a statement of the questions involved at page 2, and a statement of the case at page 3.

STATUTES INVOLVED.

The statutes involved are referred to in the Petition at page 3.

SPECIFICATION OF ERRORS TO BE URGED.

The errors which will be urged if the writs of certiorari are granted are that the Circuit Court of Appeals for the Third Circuit erred:—

1. In failing to apply the primary test of whether the trusts were enterprises for the transaction of business or were created and maintained as a medium for the carrying on of a business enterprise and sharing its gains before considering corporate resemblance.
2. In failing to hold that the purposes of the trusts were to hold and conserve the trust property with incidental powers.

3. In holding that the primary test is the similarity of the benefits enjoyed by virtue of the trust when compared with those afforded by the use of the corporate forms.

4. In holding that the presence of the five attributes afforded by corporate organization mentioned by this Court in *Morrissey v. Commissioner*, 296 U. S. 344, 359, were sufficient in themselves to classify the trusts as associations.

5. In holding that all five of said attributes were to be found in the two trusts.

6. In holding that the question at issue was whether the trusts were associations or "pure trusts", that is trusts of the traditional pattern, and that the trusts involved in these cases were associations because they did not resemble "traditional trusts".

7. In failing to construe the term "associations" in its literal and ordinary meaning and giving said term a strained construction not justified by the language used, other provisions of the Revenue Acts and the general scheme of taxation intended by Congress in the Revenue Acts.

8. In failing to hold that the investors were not associates.

9. In failing to hold that the trusts were taxable as trusts.

10. In holding that the trusts were associations and hence taxable as corporations.

11. In affirming the judgments of the District Court.

Argument.

We will first discuss rulings of the Commissioner and the opinions of the District and Circuit Courts. We will then expand our argument upon the first four reasons relied on for the allowance of writs of certiorari and will conclude our brief with an analysis of other Circuit Court cases relied on below and our concluding summary.

THE RULINGS OF THE COMMISSIONER AND THE DECISIONS OF THE DISTRICT AND CIRCUIT COURTS.

The Commissioner first ruled that one of the trusts administered by the petitioner was an association and then under date of May 18, 1936 reversed his ruling and held that the legal effect of the plan set forth in the trust was that each investor makes the trustee an agent without discretion and merely for the purpose of holding the naked legal title of the property of its principal. (R. 25)

The Commissioner under date of January 28, 1937 reversed himself again and held that thirteen trusts administered by the petitioner were associations. (R. 26) The basis for the reversal was that the trustee had the authority to substitute investments, that the trusts were investment trusts and that all investment trusts whether of the fixed or management type were taxable as associations under the regulations. On this latter point it is sufficient to point out that the Circuit Court of Appeals for the Eighth Circuit in *Commissioner v. Buckley*, 128 F. (2d) 124, disposed of an argument that all investment trusts were associations by stating that such a conclusion was not justified by the opinion of this Court in the *Morrissey* case, and that Congress itself has consistently recognized that an investment trust is not necessarily an association by imposing issuance and transfer taxes upon its shares "whether or not such investment trust * * * constitutes a corporation within the meaning of this title". (Internal Revenue Code Section 1802 (a) and prior Revenue Acts.)

The District Court (R. 30-61) rested its conclusion that the trusts were associations solely upon the ground that the power to substitute investments was management. It did not find that the trusts were joint business enterprises or that they had been created and maintained to provide a medium for the conduct of a business and sharing its gains. Its approach to the cases was superficial and in sharp contrast with its approach and well reasoned opinion in a case involving a fixed investment trust decided on the same day, *Pennsylvania Co. etc., Trustee v. United States*, 48 F. Supp. 969.

In its argument before the Circuit Court the respondent did not attempt to justify the decision of the District Court on the narrow grounds stated in its opinion. It advanced the argument that any trust which is not "a pure trust" must necessarily be a business trust, and relied upon the secondary test of the five features of the resemblance to corporate organization mentioned by this Court in the *Morrissey* case.

The Circuit Court substantially adopted the argument of the respondent. While it did not actually hold that any trust which is not a pure trust must be a business trust, this is the effect of its opinion. It stated that the issue involved was whether the trusts involved were pure trusts or associations. (R. 66) It held that the term "associations" as employed in the Revenue Acts embraces "business trusts", and that what Congress did not intend to embrace within the term "associations" were "pure trusts, that is, trusts of traditional pattern where property is conveyed by will, deed, or declaration to a trustee or is to be retained by the settlor on specified trusts for a certain term for the benefit of named or described persons." (R. 71) It erroneously held that "under the *Morrissey* case the test primarily is the similarity of the benefits and privileges enjoyed by virtue of the trust when compared with those afforded by the use of the corporate forms" (R. 72),

went on to list the five features which this Court mentioned in said case, held that when they are found in a trust they are "sufficient to characterize it as an association" (R. 72), and then erroneously held that all five features were to be found in the trusts here involved. (R. 73) It held that the power of substitution of the sponsoring companies was reposed in them for a business reason (R. 73) and that it was exercisable by the distributing companies according to their "business purposes and motives". (R. 74)

The Circuit Court further distinguished the trusts here involved from "traditional trusts" on the basis that the trustee's functions resemble those of a custodian, that in essence the investors were merely purchasers of the shares, and that each investor has the several right to exhaust the trust res while the trustee remains helpless. It overlooked that these facts are evidence that the trusts do not resemble corporations. The limited nature of the functions of the trustee negatives the element of centralized management, and the power of the investors severally to repossess their interest in the trust res is an element found in ordinary revocable trusts and negatives the concept of a continuing entity holding assets which is characteristic of a corporation. The Circuit Court concluded without justification that the trusts had not been formed for the purpose of holding and conserving property in the manner ordinarily afforded by a trust, and again confused the business activities of the distributing company, in whose profits the investors do not share, with the participation of the investors in the trusts. (R. 74) The only purpose assigned to the investors, which resembles a business purpose, is that they participate in the trust "in the hope of a return by way of dividends and of gain through the possible enhancement in the value of the trust shares". (R. 74) It is sufficient to say that such is the hope of every member of the investing public, that there is no evidence supporting this finding, and that this Court has held in *Higgins v. Commissioner*, 312 U. S. 212, that the investment activities an individual do not constitute doing business.

It is significant that the Circuit Court did not attempt to apply the primary test of the *Morrissey* case by first determining whether the trusts were formed and maintained for the purpose of entering into a business enterprise and sharing its gains. The decision of the Circuit Court thus raises several fundamental points. Shall the question be tested by the superficial test of resemblance to corporate organization, or shall the primary test be whether the trust is a business trust? Shall the term "associations" be given its ordinary and literal meaning or shall it be extended beyond the clear import of the language used? Shall any doubt be resolved in favor of the taxpayer, especially when a finding in favor of the government results in double taxation of the same income?

I. THE CIRCUIT COURT FAILED TO FOLLOW THE MORRISSEY CASE.

Prior to the *Morrissey* case the leading case in this Court was *Hecht v. Malley*, 265 U. S. 144. In that case it was held that Massachusetts business trusts were associations although formed under trust agreements rather than under statutes. Prior cases holding to the contrary were distinguished in view of changes in the Revenue Acts. This Court there held (p. 157) that "the word 'association' appears to be used in the Act in its ordinary meaning" and quoted the following definitions found in standard dictionaries, which were again quoted in the *Morrissey* case (p. 352); "a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise"; "a body of persons organized for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation"; "an organized but unchartered body analogous to but distinguished from a corporation".

In 1935 this Court decided the *Morrissey* case and also its companion cases, *Swanson v. Commissioner*, 296 U. S. 362; *Helvering v. Combs*, 296 U. S. 365; and *Helvering v.*

Coleman-Gilbert Associates, 296 U. S. 369. There was no doubt in each of these cases that the trusts under consideration were business trusts. The trusts in the *Morrissey*, *Swanson* and *Coleman-Gilbert Associates* cases were real estate trusts under which the trustees were empowered to develop and deal extensively in real estate. The Combs trust was formed for the purpose of developing an oil property. The point argued in the *Morrissey* case was that beneficiaries of the trust had no powers to control the policies of the trustees similar to the powers of stockholders of a corporation. This Court held that this one factor was not sufficient to classify the trust as a trust rather than as an association.

The opinion of this Court in the *Morrissey* case stated at considerable length the fundamental principles by which the question was to be determined. The primary test was whether the trusts had been created and maintained as "a joint enterprise", or "an enterprise for the transaction of business" (p. 356), or to provide "a medium for the conduct of a business and sharing its gains" as distinguished from an object "to hold and conserve particular property with incidental powers" (p. 357). "The nature and purpose of the co-operative undertaking will differentiate it from the ordinary trust." (p. 357). The importance of this primary test is emphasized by the fact that this Court used the same or similar language repeatedly in the course of its opinion.

The secondary test is resemblance to corporations (p. 357). This Court, of course, did not undertake in its opinion to point out all respects in which a business trust might resemble a corporation. It mentioned five features (p. 359) which have been referred to in subsequent lower court decisions. These five features are not primary tests of the fundamental question and were never intended to be so construed. They all may be found in a trust as well as in a corporation, and were merely enumerated as features which may be evidence of resemblance to corporate organization.

The only case on the question which this Court has since decided in *Lewis & Co. v. Commissioner*, 301 U. S. 385, which serves to demonstrate that the principles announced in the *Morrissey* case are not to be unduly extended.

There are a number of federal cases, decided since the *Morrissey* case, which approach the problem by first determining whether the trust is a business trust. If it is not, the secondary test of corporate resemblance is not controlling. The cases which involve trusts of securities are: four fixed investment trust cases; *Commissioner v. Chase National Bank*, 41 B. T. A. 430; 122 F. (2d) 540; *Commissioner v. Buckley*, 128 F. (2d) 124; *Pennsylvania Company, etc. v. United States*, 48 F. Supp. 969; *Pennsylvania Company, etc. v. United States*, 48 F. Supp. 972; a periodic payment plan trust case, *Equitable Trust Company v. Magruder*, 37 F. Supp. 711; and a case involving a trust set up by the Chrysler corporation for the benefit of its officers, *Estate of Frederick L. Alldis v. Commissioner*, 46 B. T. A. 1171. Among the cases involving other kinds of trusts are *Cleveland Trust Company v. Commissioner*, 115 F. (2d) 481 (certiorari denied, 312 U. S. 704), and *United States v. Davidson*, 115 F. (2d) 799.

Commissioner v. Chase National Bank, supra, is the leading case upon fixed investment trusts. A fixed investment trust contains a number of resemblances to corporate form. The so-called "depositor", which corresponds to the sponsoring company in our cases, has the power to require the trustee to sell the stock of any company, held in the trust, which in its opinion has become an undesirable investment. This power corresponds to the power of substitution in our cases. The Board of Tax Appeals held that the powers of the trustee were "purely ministerial", that the powers of the depositor were "among the usual powers of an ordinary trustee", that the trust provided no "medium for the conduct of a business and sharing its gains", and that "the trustee's operations could not be called 'an enterprise for the transaction of business' which the Supreme Court in *Morrissey v. Commissioner*, 296 U. S.

344, regarded as implicit in the statutory term 'associations'". (41 B. T. A., at page 442) It did not consider corporate resemblances.

On appeal the Circuit Court for the Second Circuit held that "in determining the character of these trusts the powers and duties of the trustee should be added to those of the depositor in order to arrive at the full amount of permitted managerial activity and its object", that the power of elimination affected "the property held in trust only by weeding out whatever became unsound for investment", that the Board's finding that "the trust property was to be held for investment and not to be used as capital in the transaction of business for profit like a corporation organized for such purpose" was well supported, and that "this distinction is what makes the difference tax-wise" under the *Morrissey* case. (122 F. (2d) at page 543) No mention was made of corporate resemblances.

The *Chase National Bank* case was relied on by the Circuit Court for the Ninth Circuit in holding another fixed investment trust to be a trust for tax purposes. *Commissioner v. Buckley, supra*. It was also relied on in two fixed investment cases decided by the same District Court which decided our cases on the same day. In its opinions the District Court also examined corporate resemblances and found they were not controlling in view of the fundamental purposes of the trusts. *Pennsylvania Company etc. v. United States, supra* (two cases).

The *Magruder* case is important because it holds that a periodic payment plan trust is not an association in a well reasoned opinion and correctly applies the primary test. The Collector in that case filed an appeal to the Circuit Court of Appeals for the Fourth Circuit and thereafter withdrew his appeal.

The *Alldis* case, which has been appealed and has been argued before the United States Circuit Court for the Sixth Circuit, is important because the trust there under consideration granted to the Chrysler Corporation very consid-

erable powers of management. The Commissioner ruled that the trust was a trust and not an association and has consistently maintained that position both before the Board of Tax Appeals and the Circuit Court.

There is still another case as yet unreported which was set for argument before the Circuit Court of Appeals for the Tenth Circuit on January 17th, 1944: *Commissioner v. City National Bank and Trust Company, Trustee*. The opinion of the United States Tax Court may be found at § 43, 131 of Prentice-Hall 1943-1944 Tax Court Memorandum Decisions Service. This case involves a trust which is a combination of a fixed investment trust and a periodie payment plan trust. The Tax Court held it to be a trust and not an association relying on the *Chase National Bank* and *Buckley* cases and on the *Magruder* case.

All of the Five Features of Resemblance to Corporate Organization Are Not Present in These Trusts.

The statement of the Circuit Court that all of the five features mentioned by this Court in the *Morrissey* case were present in the case of these trusts is erroneous. We will take them up in order but before doing so we point out that this Court stated in the *Morrissey* case that these five features were often to be found in trusts as well as corporations, so that it cannot be the law that a trust must be an association even if all five features are present.

1. A continuing entity as holder of legal title to the trust res. In a loose sense this feature is present, but in the sense that it is a feature usually found in a corporation we find two points of difference. In the first place, each individual investor may at any time terminate his certificate and possess himself of his share of the trust property or the proceeds thereof. A stockholder of a corporation has no such right and one of the advantages of the corporate organization is that the assets of the corporation cannot be disturbed by the individual stockholders. The action of the

stockholders voting as a group is required. In the second place, the trust res is allocated upon the books of the trustee to each individual investor in accordance with the number of shares which have actually been purchased with his own money. In this respect we have a separation and earmarking of the assets entirely foreign to corporate practices.

2. Centralized management through the trustee. The Circuit Court has found that the trustee's powers resembled those of a custodian. Its powers are ministerial and are limited by the terms of the trust agreements and certificates. There is certainly no central management lodged in the trustee in the sense that term is used in the *Morrissey* case, to wit, powers which are exercised "in much the same manner as directors". The powers of substitution are trust powers as we will demonstrate below.

3. Security from termination or interruption by reason of the death of owners of beneficial interest. This element is present but it is an element of a trust as well as a corporation. In the *Morrissey* case this Court stated that this element was more a distinction applicable to partnerships than a distinction between trusts and corporations (p. 359).

4. The facilitation of transfer of beneficial interests and the introduction of large numbers of participants without affecting the continuity of the enterprise. These elements are present, but again the distinction would seem to apply more to partnerships. Inasmuch as there may be thousands of participants in an employees' trust of a large corporation, and Congress taxes such trusts as trusts and not as associations, this element cannot have any great importance. See also *Swanson v. Commissioner, supra*, where this Court held that a limited number of participants did not affect the general question.

5. The limitations on the liability of the participants to the property embraced in the undertaking. There is no

basis whatsoever for the Circuit Court's finding that this feature was present in the two trusts involved. What this Court had in mind in the *Morrissey* case was a provision in the trust agreement that all persons dealing with the trustee were required to look for payment or indemnity only to the trust property (p. 347). There is no such provision in either of the trust agreements in these cases.

The Powers of Substitution Are Incidental Trust Powers.

The trustee of an ordinary trust under will or deed is granted the power to invest and reinvest the corpus of the trust. This is a fundamental trust power. Some trustees are limited in their powers of investments, others are given broad powers. A trust in which the trustee has broad powers would not be classed as an extraordinary trust.

This court held in *City Farmers Trust Company v. Helvering*, 313 U. S. 121, and *United States v. Pyne*, 313 U. S. 127, that the activities of a trustee in investing and reinvesting trust property did not constitute doing business, and that the expenses incurred in such activities were not deductible as business expenses for income tax purposes. The power to eliminate undesirable stocks from a fixed investment trust was held to be an investment power in *Commissioner v. Chase National Bank, supra*, at page 543; and it was recognized in *Cleveland Trust Company v. Commissioner, supra*, at page 484, that trustees ordinarily have the right to invest and reinvest and that this power does not convert a trust into an association.

The power of the sponsoring company to substitute under the Capital agreement is a very limited one. (Appendix p. 56.) In the first instance, substitution must be made in the shares of another fixed investment trust, if such shares are available; and the substituted shares must have underlying securities reasonably comparable to those underlying Independence Trust Shares. If such other shares are not available, or their purchase is impractical, the sponsoring company may, if it deems such investment

more beneficial to the investors, substitute receipts or certificates of interest issued by banks or trust companies, evidencing the deposit of underlying securities again reasonably comparable to the securities underlying Independence Trust Shares. The power of substitution under the Capital Agreement is therefore very limited in nature. It requires that an equivalent investment be furnished. It requires that the investment policy fixed by choosing Independence Trust Shares as the original investment be substantially carried on throughout the entire period of the trust. It will be further noted that the implication is that any substitution is to be made from the point of view of the best interests of the investors, and not to serve the business purposes of the sponsoring company.

In the Wellington Trust Agreement the power of substitution of the sponsoring company is broader (Appendix pp. 94-96), but again we find that the substitution in the first instance must be made in the shares of another investment trust, incorporated or unincorporated, having securities in its portfolio reasonably comparable with those in the portfolio of Wellington Fund, Inc., the original investment. If such shares are not available or the purchase of them is impractical, other shares may be substituted which in the opinion of the sponsoring company will supply the investors with shares of reasonable security and income producing characteristics. Here again, we have an implication that the best interest of the investors is to be taken into consideration. The standard to be applied requires like shares if possible, otherwise shares having investment characteristics of security and income rather than speculative characteristics designed to realize trading profits.

The power of the trustee to substitute can only be exercised when substitution is necessary in order to continue the operation of the plans. Under the Capital agreement the trustee can substitute only if the shares then purchaseable cease to be available for purchase and the company within sixty days after notice fails to provide other shares

(Appendix p. 59), or if the shares currently to be purchased can be purchased only at unreasonable prices (Appendix p. 59). In each case, however, the trustee must give thirty days' notice to each investor and it can substitute other shares only for those investors who give their consent in writing. In this respect the trustee's power is more limited than the power of an ordinary trustee who has authority to invest and reinvest without seeking the consent of the beneficiaries.

Under the Wellington Trust Agreement the trustee has the power to substitute only if the sponsoring company fails to furnish it with an adequate source from which it can purchase shares on demand at market value (Appendix p. 96), and again we find that its power to substitute is limited to those investors who give their approval in writing after thirty days' notice.

We submit that there was no basis for holding that the power of substitution in either trust was to be exercised for other than sound investment reasons, or that they were to be exercised except when "necessary" (Appendix p. 57 and p. 96) to the continuance of the trusts.

The fact that the powers of substitution have never been exercised in either of these trusts supports our contention that they are but incidental trust powers and are not powers of management. If the intention had been to invest and reinvest the trust property so as to take advantage of swings in the market and realize profits, the power of substitution would have been exercised again and again.

We are aware that in the *Helvering v. Coleman-Gilbert Associates*, *supra*, this Court held that a trust must be classified on the basis of what can be done under the trust agreement rather than what has been done. Every principle of law is applicable to the particular facts of the case. In the *Coleman-Gilbert* case the added powers which had not been exercised were very broad. The trustee was authorized to deal very extensively in real estate. The Circuit Court had held that the trust was a liquidating trust. This Court held

that it was not if these added powers were taken into consideration. The situation here is different. We have one single power which has some slight resemblance to central management. The question is whether it is a power of central management or merely an incidental trust power. The fact that it has never been exercised supports our argument that it was never intended to be more than an incidental trust power.

II. THE CIRCUIT COURT ERRONEOUSLY CONSTRUED THE INTENT OF CONGRESS.

This Court has held in a number of cases of which *United States v. Merriam*, 263 U. S. 179, is the leading case, that taxing statutes are not to be extended by implication beyond the clear import of the language used and that doubt as to the meaning of their words must be resolved against the government and in favor of the taxpayer. In a subsequent ruling the Commissioner held that dividends and distributions received for each investor upon his trust shares should be treated as distributed for federal tax purposes, whether remitted or invested in additional shares. The further rule of statutory construction announced by this Court in *Crocker v. Malley*, 249 U. S. 223, therefore also applies. In that case the late Justice Holmes held that a tax statute should not be construed to tax the same income twice unless the intent to do so is clearly expressed.

The respondent before the Circuit Court argued that any trust which is not a "pure trust" must be classified as an association. While the Circuit Court did not entirely adopt this argument, it construed the intent of Congress in such a manner as to substantially adopt the respondent's theory.

It stated that the question involved was "whether the trusts under consideration are pure trusts or associations taxable as corporations within the meaning of the Revenue Acts" (R. 66), and after holding it was certain that the term "associations" embraces "business trusts", it went

on to hold that what Congress did not intend to embrace within the term "associations" were "pure trusts, that is, trusts of the traditional pattern where property is conveyed by will, deed, or declaration to a trustee or is to be retained by the settlor on specific trusts for a certain term for the benefit of named or described persons". (R. 71) It then distinguished the trusts here involved from traditional trusts on the basis that the distributing companies were not settlors, that the investors were entitled to take down their interests in the trust at any time while the trustee remains helpless, and that the functions of the trustee amount to little more than a custodianship. It lost sight of the fact that each individual investor is a grantor of the trusts as far as his interest therein is concerned, and that its inference that the trusts have no grantors is unsound. It lost sight of the fact that the ministerial functions of the trustee negate the attribute of "central management through the trustee". It lost sight of the fact that the power of each investor to take down his interest in the trust at any time is a power which the grantor of any revocable trust may at any time exercise, and that in a revocable trust the trustee is equally helpless to maintain and preserve the trust estate intact if the grantor elects otherwise.

The fundamental question is what was the intent of Congress when it used the term "associations" in the statutes involved, applying well settled rules of construction of tax statutes? The intent of Congress must be construed so as to give the term "associations" its ordinary and literal meaning without extending the meaning beyond the clear import of the word used. The question at issue is not whether the trust is a pure trust or an association, but whether what is a trust in form and in substance must be construed to be an association resolving any doubt in favor of the taxpayer.

The general scheme of Congress under the various Revenue Acts has been to tax primarily income of individuals

and corporations. Partnerships are not taxed as separate entities. Their income is wholly taxed to the partners whether distributed or not. Trusts are not taxed upon distributed income and the income of some trusts, such as revocable trusts, are taxed entirely to the grantors. Income received by an agent is never taxed in his hands; it is taxed as the income of his principal. The sections of the Revenue Act and Internal Revenue Code which tax trusts do not disclose any intention to exclude "pure trusts", or "traditional trusts" from their operation. Under Section 161 of the Internal Revenue Code a tax is imposed upon the income "of any kind of property held in trust", the broadest kind of a clause. Section 165 of the Internal Revenue Code provides for the taxing of employees' trusts. The usual form of employees' trust is really an investment trust managed by a committee appointed by the employer for the benefit of employee beneficiaries. An employees' trust does not exactly fit the definition of a pure trust or a traditional trust contained in the Circuit Court's opinion.

The construction of the intent of Congress announced by the Circuit Court has led in these cases, and will inevitably lead in other cases, to the classification of trusts as associations on superficial and technical grounds. It bypasses the fundamental question of whether the trust is really an association in the ordinary and literal sense. The primary test adopted by this Court in the *Morrissey* case is the only sound test to apply in construing the intent of Congress. In order to justify the taxation of a trust as a corporation, it must really be an association; it must have been created for the purpose of conducting a business enterprise and sharing its gains.

The trusts involved in these cases are certainly ordinary trusts and they are traditional trusts within most of the elements contained in the Circuit Court's decision of that term. They are created by a trust agreement which is equivalent to a deed or declaration. The terms of the trust are specified with great particularity. The term of the

trusts with respect to each investor is as certain as is the term of any revocable trust. The beneficiaries are described persons, viz.: those persons who become beneficiaries by accepting certificates. The trusts are nonetheless trusts because the functions of the trustee are ministerial. Many trust instruments are so drawn and it cannot be said that such trusts are extraordinary as distinguished from ordinary trusts.

The two trusts involved in this case are as much like traditional trusts as the trusts involved in the cases cited above at page 22 of this brief. They are as much like traditional trusts as fixed investment trusts. They are very similar to the periodic payment plan trust in the *Magruder* case. In a great many respects they are more like traditional trusts than the trusts involved in the *Alldis* and *Cleveland Trust Company* cases. They are certainly as much like traditional trusts as liquidating trusts which often issue shares and often grant the trustee broad powers of management. The cases consistently hold that liquidating trusts are not associations so long as their purpose is liquidation, that broad powers in the trustee do not constitute central management and do not turn the activities of the trust into a business venture. (See *United States v. Davidson, supra.*)

**III. THESE TRUSTS WERE CREATED AND HAVE
BEEN MAINTAINED FOR THE PURPOSE OF
CONSERVING AND HOLDING PROPERTY FOR
THE SEVERAL BENEFIT OF THE INVESTORS.**

There is no basis whatsoever for the conclusion of the Circuit Court that these trusts were not formed and maintained for the purpose of holding and conserving the trust property. The essence of a periodic payment plan is that as each investor makes his payments, the trustee, after making authorized deductions, purchases the designated shares for him, and that the shares purchased and accumulated from time to time shall be held in trust for long

periods of time unless the investor defaults or unless the investor determines to revoke the trust as far as he is concerned. The essence of a fully paid plan is that the shares purchased for the particular investor are to be held for him for a long period of time subject to his right of revocation.

Neither of the trust agreements disclose any purpose that the trustee shall engage in a business enterprise in the ordinary or literal sense. The very name "Capital Savings Plan" implies a purpose to accumulate an investment rather than to engage in business. The designation of the beneficiaries as "investors" in the Capital plan has a like implication. The same implication is contained in the first whereas clause of the Wellington Agreement (Appendix p. 87) which states that the purpose of the plan is "to provide the holders with a convenient means of a systematic and protected medium of saving and investment".

The Capital Trust Agreement evidences an intention that the trustee is to hold the shares purchased for each investor and for his account until he terminates his certificate. For instance, in Section 1 of Article II (Appendix pp. 45-46) it is provided that after the trustee has made the authorized deductions, the balance of the investor's payments "shall be invested by the Trustee for the account of the Investor". In Section 2 of the same Article (Appendix p. 46) it is stated that the trustee shall hold in its name as trustee the shares purchased by it "In Trust, for each of the several Investors in the respective series in the proportion to which they may be respectively entitled". In Section 3 of the same Article it is provided that the trustee shall collect all distributions on the shares and shall apply the same to the purchase of additional shares and "likewise hold the same in trust for the several Investors". In Section 7 of the same Article it is provided that after the trustee makes the authorized deductions from the single payment under the fully paid certificate, it shall apply the balance to the purchase of shares and "shall continue to hold the same for the benefit of

the Investor". In the certificates (Appendix p. 67 and p. 71) we find a provision reading that until the certificate shall have been terminated the shares "purchased for the account of the Investor shall be held by the Trustee, pursuant to the terms of the Trust Agreement".

There are other provisions in the trust agreements and the certificates which could be mentioned to illustrate the general purpose to hold and conserve the trust property, but we will not unduly extend this brief for that purpose. We submit that the principal object of the trusts is plain, viz: to hold the shares purchased for each investor for long periods of time until he elects to withdraw.

We submit that Congress never intended to tax trusts of this nature as corporations. They cannot be administered as corporations and we do not see how they could be organized as corporations. There are many fundamental differences and again in the interest of brevity we point out only the following.

1. The certificates do not resemble shares of stock (Appendix p. 65, p. 69 and p. 100). They take the form of a contract under which the individual investor agrees to make certain payments, authorizes certain deductions to be made therefrom and authorizes the balance to be invested in designated shares. They do not evidence a pro rata interest in a pool of assets. The investors do not buy shares in the trusts. They buy the share of an investment trust or investment company through the trustee.

2. The certificates are not transferable in the manner certificates of stock are transferable. They are contracts and are assignable in the manner ordinary contracts are assignable, that is with the consent of the parties and subject to the agreement of the assignee to become bound by the terms of the contract. (Appendix p. 84 and p. 88)

3. The trusts have no capital and surplus in the sense that a corporation has capital and surplus. The trustee keeps no capital and surplus accounts. (E. 9, 46)

4. Each investor has at any one time an interest in a definite part of the trust res, unlike the interest which a stockholder has in a corporation.

5. The investors have no voting rights with respect to the administration of the trusts. There is no provision for meetings of investors and no meetings have ever been held. (R. 9, 46)

6. Once the trustee accepts its trusteeship under a particular certificate it cannot resign or be removed unless there is a default under a periodic plan, except in a remote contingency in the case of the Wellington plan. (R. 68) In a corporation the stockholders have the right to elect a new board of directors.

7. There is no body which acts "in much the same manner as directors". (*Commissioner v. Morrissey, supra*, p. 359) The trustee's functions are ministerial and are prescribed by the trust agreements. The powers of substitution are trust investment powers.

8. There is no power to distribute profits which corresponds to the power of the board of directors of a corporation to declare dividends. The income received is not the income or profits of a common enterprise. The income received upon the shares held for each investor belongs to him and must be reinvested or remitted in accordance with his instructions or in accordance with the trust agreement. (R. 5, 41) Neither the trustee nor the distributing companies can deviate from the instructions given or from the terms of the trust agreements.

9. If profits are realized from the sale of shares, they are realized because the certificates of the particular investors have been terminated and the profits belong to these investors and cannot be distributed generally to all investors as profits of the trust. (R. 7, 43)

10. Losses, likewise, are suffered by the individual investors and cannot be charged against the trust generally

and against the investors who do not participate in the losses.

11. The individual investors may at any time revoke the trust as far as his particular interest is concerned. Partial liquidation of the assets of a corporation are made to classes of stockholders and not to individual stockholders.

12. The investors as a group have no right to terminate the trusts as a whole equivalent to the power of the stockholders of a corporation to dissolve it.

13. These trusts have no minute book or seal, no officers, employees or separate business stationery.

IV. THE INVESTORS ARE NOT ASSOCIATES.

In the *Morrissey* case this Court aptly observed that the term "association" implies "associates" (p. 356). We know of only one case in which this point has been raised and it is significant that it was raised and decided in favor of the taxpayer in *Equitable Trust Company v. Magruder, supra*, which involved a periodic payment plan trust.

One of the unusual features of the trusts involved in these cases is that fundamentally there is a separate trust for each investor, because the trustee is required to note the exact number of shares held for each investor upon a separate account. Each investor from time to time has an equitable title to the shares noted in his account in the same manner that the customers of a stock broker have a traceable title to stock held by the broker in street name. *Gorman v. Littlefield*, 229 U. S. 19.

If we place ourselves in the shoes of an investor who subscribes for a plan and consider the certificate which he receives, we will note that he has no reason to believe that he is concerned with what any other investor may do or with what the trustee may do with any other investor's money. Any one investor is concerned only with what payments he has made, what deductions the trustee makes from

his payments, the number of shares which are purchased for him and what the trustee does with his distributions or dividends. If he has subscribed for a certificate with insurance benefits he is also concerned with whether the trustee maintains his insurance, and if he dies, only his estate or personal representative is concerned with whether or not the insurance is collected. If he desires to withdraw he is interested only in the exact number of shares which are held for him and not in the shares which are held for any other investor. The distributions or dividends on his shares belong to him and to no other investor. If he terminates his plan and orders his shares sold the proceeds of sales, and the resulting capital gain or loss is his and his alone.

The capital gains tax which was paid in the Capital case for the year 1937 demonstrates our point. In that year 258 investors severally instructed the trustee to sell their shares. The shares of a considerable number of investors were sold at a gain. The shares of a few more were sold at a loss. The entire proceeds of each sale were distributed to the particular investor in accordance with the trust agreement including the capital gain where gains were realized. The investors who did not terminate but permitted their trust shares to remain in the possession of the trustee were not concerned in the slightest with these sales, yet if the trust was properly classified as an association a capital gains tax was assessable against the trust as a whole and investors who had no concern whatsoever with the gains realized were charged with the tax.

Cases Relied Upon by the Circuit Court.

In addition to the decisions of this Court in the *Morrissey* case and its companion cases, which the Circuit Court failed to apply properly, it relied on three decisions in other circuits.

Fidelity-Bankers Trust Co. v. Helvering, 113 F. (2d) 14, is a case where a syndicate had been created in trust form

to take over certain real estate assets of a failing bank, and to manage these assets for the purpose of repaying contributions of subscribers to the trusts and of dividing the profits between the subscribers and the bank. The principal argument of the taxpayer was that the transaction was essentially a loan and the decision of the United States Court of Appeals for the District of Columbia to the contrary was obviously sound. The Court in that case did not fall into the same error as the Circuit Court in our cases. It recognized that the Revenue Acts only tax trusts which are doing business for profit and that the ultimate question is whether the trust performs some non-business functions or operates a business enterprise as a going concern (see pages 17-18 of opinion).

The trust in *Commissioner v. North American Bond Trust*, 122 F. (2d) 545, was an investment trust similar to fixed investment trust which was not in fact fixed. The sponsoring company not only had the right to eliminate undesirable investments as in the usual fixed investment trust, but as new units were created it could deposit bonds other than those underlying units already created. In this way it could take advantage of market conditions and could vary at will the interests of those who were already beneficiaries of the trust. The case is a close one. We believe it was erroneously decided, and that the dissenting opinion is sound law.

In *Hamilton Depositors Corporation v. Nicholas*, 111 F. (2d) 385, the opinion shows that the sponsoring company "had large supervisory and directory powers over the trustee directing the trustee in the management, investment, and handling of property" (p. 387) and that the trust contemplated that the stocks to be purchased were to be sold and reinvested from time to time and "that the income and profit from the operation of the trust will be distributed and paid to the beneficiaries" (p. 386). (Italics ours.)

Conclusion.

The effect of the decision of the Circuit Court is to impose double taxation upon the investors by a strained construction of the Revenue Acts beyond their literal and ordinary meaning. The purpose of the trusts in these cases is to hold and conserve the trust res and collect the income. There is no purpose to engage in a business enterprise. They are not business trusts. They bear practically no resemblance to corporations in form, substance or operation. The interests of the investors in the trust res are several and not joint or common. The investors are not associates, nor are the activities of the trustee in any sense joint enterprises or common enterprises. The powers of substitution are incidental powers, considerably more restricted than the investment powers of an ordinary trustee. The decision of the Circuit Court is erroneous and fails to follow the decisions of this Court and well reasoned decisions of other federal courts.

It is therefore respectfully submitted that writs of certiorari should issue in these cases.

Respectfully submitted,

WALTER BIDDLE SAUL,
Attorney for Petitioner.

SAUL, EWING, REMICK & HARRISON,
FRANCIS H. BOHLEN, JR.,

Of Counsel.



Appendix.

CAPITAL TRUST AGREEMENT.

AGREEMENT dated August 9, 1932, by and between CAPITAL SAVINGS PLAN, INC., a corporation organized and existing under the laws of the State of Pennsylvania (hereinafter called the "Company"), party of the first part; THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, a corporation organized and existing under the laws of the State of Pennsylvania (hereinafter called the "Trustee"), party of the second part; and THOSE PERSONS who from time to time become parties hereto by purchasing Contract Certificates of Capital Savings Plan, Inc., hereinafter referred to and described (such persons being hereinafter called "Investors"), parties of the third part;

WHEREAS, the Company has full power and authority to execute and to sell from time to time Contract Certificates upon an instalment basis, with or without insurance protection and/or full paid Certificates, of the form and tenor attached hereto and made a part hereof as Exhibits "C", "C-1" and "D", together with such other Contract Certificates as from time to time may be necessary or desirable upon the adoption by resolution of the directors of the Company and the approval of the Trustees; and

WHEREAS, pursuant to the terms of said Contract Certificates and to the extent therein provided, the Trustee will purchase for the Investors' Independence Trust Shares, or, upon substitution by the Company, as hereinafter provided, other trust shares or receipts of banks, trust companies or banking institutions or certificates of deposit or of interest or of participation evidencing deposit of, or representing blocks of, underlying securities reasonably comparable to the securities underlying Independence Trust Shares (hereinafter called "Trusted Property"); and

WHEREAS, the Trustee has agreed and does hereby agree, in accordance with the terms of said Contract Certificates, to hold in trust the Trusteed Property so purchased by it from time to time for the Investors until maturity of any Contract Certificate or earlier termination thereof, as hereinafter provided; and

WHEREAS, the Company and the Trustee have authority to execute and deliver this Trust Agreement and have duly authorized the execution and delivery thereof.

Now, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, and the payments to be made by the Investors, and, in order to declare all terms and conditions relating to the Trusteed Property and to the holding thereof in trust by the Trustee, the parties hereto, each for itself and himself and not on behalf of any other party, agree each with the other as follows:

ARTICLE I.

DESCRIPTION OF CONTRACT CERTIFICATES.

1. The Contract Certificates shall be issued by the Company without limit, from time to time as the Company shall determine. Every Certificate shall bear the date of the day of the month on which such Contract Certificate is issued. The issuance of all Contract Certificates shall cease ten years prior to the termination of a Deed of Trust dated April 2, 1930, entered into by and between Independence Shares Corporation and The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, or ten years prior to the termination of any extension thereof; provided, however, that in the event a substitution of Trusteed Property be effected under Article VI hereof, the issuance of Contract Certificates shall cease ten years prior to the termination of such Deed or Deeds of Trust, or any extension or extensions thereof, securing such substituted Trusteed Property. All Contract Certificates shall provide

for the payment by the Investor of the sum of \$1,200.00 or multiples thereof to the Trustee either (a) in instalments of \$10.00 per month or multiples thereof, for a period of ten years, payable on or before the same day of each month as the original date of the Contract Certificate, or (b) in one lump sum payment, and in the case of (a) may be accompanied by insurance on the life of the investor, as herein-after provided. The form of Contract Certificates shall be substantially the same as set forth in Exhibits "C," and "C-1" and "D" hereto attached. Contract Certificates shall be executed on behalf of the Company by the engraved or lithographed facsimile signature of its President, and the corporate seal thereunto attached, duly attested by the Secretary of the Company or any Assistant Secretary. No Contract Certificate shall be valid or obligatory for any purpose nor be entitled to any right or benefit under this Trust Agreement, unless and until the certificate of authentication and registration thereon endorsed shall have been executed by the Trustee through one of its authorized officers.

2. In case any of the officers of the Company who shall have executed any Contract Certificate issuable under this Trust Agreement shall cease to be such officer before such Contract Certificate shall be actually authenticated and delivered by the Trustee, such Contract Certificate shall nevertheless bind the Company as though the person who had executed the same had not ceased to be officer of the Company, and the Company may adopt and use for the purpose of executing any Contract Certificate the engraved or lithographed facsimile signature of any person who shall have been President of the Company, notwithstanding the fact that he may not have been such President at the date of such Contract Certificate or that he may have ceased to be such President when such Contract Certificate is actually authenticated and delivered.

3. All Contract Certificates shall be registered upon the books of the Company, to be kept by the Trustee at its prin-

cipal office, and the Trustee shall also keep a record of the address of each Investor and of all payments made by him under his Contract Certificate and of all additional credits and/or charges against such Investor's account. The Trustee shall send all notices to the Investors required by this Trust Agreement and any notice so required shall be sufficiently delivered if placed in the United States Mail by the Trustee with sufficient postage attached and addressed to the Investor at his address, as the same is recorded upon the books of the Trustee.

4. All Contract Certificates issued by the Company after the Ninth day of August, 1932, shall be issued under the terms of this Trust Agreement; provided, however, that all Contract Certificates issued by the Company prior to said date under a Trust Agreement between the Company and The Pennsylvania Company for Insurances on Lives and Granting Annuities dated December 11, 1931, shall remain in full force and effect.

5. All books pertaining to each Investor's account will be maintained and kept by the Trustee at its principal office in the City of Philadelphia, State of Pennsylvania. Monthly audits of the Trustee's books of account and records will be made for and at the expense of the Company by Messrs. Lybrand, Ross Bros. & Montgomery, or other certified public accountants duly licensed by the State of Pennsylvania satisfactory to the Trustee and to the Company.

ARTICLE II.

OBLIGATIONS AND RIGHTS OF THE INVESTOR.

1. The Investor shall become a party to this Trust Agreement by becoming the purchaser of a Contract Certificate and shall make the payments to the Trustee called for by his Contract Certificate at the times and at the place set forth therein, without notice by the Trustee or the Company as to any instalment other than as set forth in the Contract Certificate. The Trustee, upon receipt of each

payment, shall, provided such shares be available for purchase, apply the same, less the deductions hereinafter provided for, not later than twenty days from the date on which such payment is due to the purchase at current market prices of Independence Trust Shares issued under an Agreement and Declaration of Trust between Independence Shares Corporation and The Pennsylvania Company for Insurances on Lives and Granting Annuities, dated as of April 2, 1930, or such other Trust Shares as the Company, as hereinafter in Article VI provided, may substitute for Independence Trust Shares. All Independence Trust Shares (or substituted Trust Shares) so purchased shall be registered in the name of the Trustee. The Trustee shall not be required to receipt to the Investor for any monthly payment made by him. The Trustee shall deduct from the monthly instalments received by the Trustee from the Investor, to cover all legal, administrative and collection expenses and the cost of life insurance in the case of a Contract Certificate accompanied by life insurance, the following: (a) from each monthly instalment paid, a sum not in excess of 1/48th of 1% of the face amount of each Contract Certificate, which shall be retained by the Trustee to provide for the expense of administering the Trust hereby created; including the compensation of the Trustee; (b) From each monthly instalment paid on a Contract Certificate accompanied by life insurance, a sum sufficient to discharge the insurance premiums as they become due, which the Trustee shall pay as agent for the Company to the Insurance Company (c) From the first twelve monthly instalments paid, a sum in the aggregate not in excess of 5% of the face amount of each Contract Certificate which shall be paid by the Trustee to the Company to be retained by the Company as its full service charge for the entire period during which the Contract Certificates shall continue in force, said service charge to be deducted from all or any such instalments in such proportion as the Company shall from time to time in writing direct. The balance if any

remaining in the hands of the Trustee from each monthly instalment, after making the deductions hereinabove provided for, shall be invested by the Trustee for the account of the Investor. The Company shall in no event be liable or accountable to the Trustee or the Investor, nor shall the Investor have any right to, nor shall the Company be obligated for, the repayment to the Investor of any part of the sums so paid to the Company hereunder.

2. The Trustee shall hold in its name as Trustee all Trusteed Property purchased by it, In Trust, for each of the several Investors in the respective series in the proportions to which they may be respectively entitled, pursuant to the terms of this Trust Agreement and the Contract Certificates.

3. The Trustee shall collect all payments, dividends and/or distributions from time to time made upon the Trusteed Property, and shall, within twenty days of receipt thereof, apply the same to the purchase of available additional Trusteed Property and likewise hold the same in trust for the several Investors.

4. Upon completion of the instalments payable by any Investor holding a Contract Certificate in the form hereto attached and marked Exhibit "C" or "C-1," the Trustee shall notify the Investor in writing of the completion of such payments, and thereupon such Investor may, upon surrender to the Trustee of his Contract Certificate, exercise either of the following options: (a) Direct the Trustee to deliver to the Investor the portion of the Trusteed Property to which he is entitled; or (b) direct the Trustee to sell at current market prices the portion of Trusteed Property to which he is entitled and pay over the proceeds thereof.

Upon the exercise of either option by any Investor, the Trustee shall, within a period of ten days from receipt of notice thereof, proceed (a) to obtain transfer of the Trusteed Property to which such Investor may be entitled into

his name or the name of his nominee and to make delivery of the same; or (b) to sell the proportion of the Trusteed Property to which the Investor is entitled at current market prices and to pay over the proceeds thereof to the Investor or his assignee. Any fraction of a share of Trusteed Property to which the Investor shall be entitled shall be sold at current market prices and the proceeds paid in cash by the Trustee.

Payment of the necessary transfer stamps or other transfer charges required to be paid by the Trustee, shall be made to the Trustee by the Investor upon the exercise of either option by any Investor who shall have completed all instalment payments.

5. Any Investor may terminate his Contract Certificate at any time, and in such event and upon surrender of his Contract Certificate to the Trustee shall thereupon become entitled to exercise either of the options specified in Section 4 of this Article II above set forth with respect to so much of the Trusteed Property as he may be entitled at the time of such withdrawal.

6. Any Investor who shall default in the payment of any instalment when due shall be considered as having terminated his Contract Certificate and shall be bound by the provisions of Section 5 of this Article II; provided that, in case of termination by default and neither option shall have been exercised by the defaulting Investor, he may, within a period of six months from the due date of the first payment defaulted upon, reinstate his Contract Certificate upon the payment to the Trustee of all unpaid instalments, but life insurance, if any, shall not be reinstated until approved by the Insurance Company.

Upon reinstatement, the Trustee shall within twenty days thereafter apply the sums paid by the Investor, less the payments to the Company if any are then due and unpaid, the deductions for the Trustee and deductions for the payment of the insurance premiums on Contract Certifi-

cates accompanied by life insurance, to the purchase of Trusteed Property at the then current market prices.

Upon default, as herein set forth, and until the exercise by the Investor of either option or reinstatement of his Contract Certificate, the Trustee shall for a period of six months from date of default continue to hold the share of the defaulting Investor in the Trusteed Property, in addition to any payments, dividends and/or distributions made upon such share of Trusteed Property during the period of default, for his account. After six months from date of default the Trustee may sell at current market prices the share of the defaulting Investor in the Trusteed Property, and thereafter hold the proceeds for his account and pay the same to such Investor upon demand therefor, accompanied by surrender of his Contract Certificate. Such payment shall constitute a complete discharge to the Trustee and the Company and the interest of the Investor in the Trusteed Property and all rights under his Contract Certificate shall thereupon cease.

7. In case of a full paid Contract Certificate in the form hereto attached and marked Exhibit "D," the Trustee shall forthwith apply the payment made thereon (less a sum not in excess of two and one-half per cent. (2½%) of such payment to provide for the expense of administering the trust including the compensation of the Trustee and a sum equal to two and one-half per cent. (2½%) of the face amount of such Contract Certificate to be paid by the Trustee to the Company as its full service charge for the entire period during which the Contract Certificate shall continue in force; provided, however, in the event an instalment Contract Certificate is converted into a full paid Contract Certificate pursuant to the terms of this Trust Agreement, the Investor shall be entitled to a credit for but shall not be entitled to be reimbursed for, any deductions made previous thereto, pursuant to the terms of Section 1 of this Article II) to the purchase of Trusteed Property, and shall con-

tinue to hold the same for the benefit of the Investor owning such full paid Contract Certificate. All distributions upon the Trusteed Property applicable to such full paid Contract Certificate shall be collected by the Trustee and applied to the purchase of additional Trusteed Property until maturity of such full paid Contract Certificate (which shall be ten years from the date thereof) or earlier termination thereof. Any full paid Contract Certificate may be terminated at any time and either option set forth in Section 4 of this Article II shall thereupon be available to such Investor. Any Investor may at any time convert an instalment Contract Certificate into a full paid Contract Certificate by paying to the Trustee the aggregate of all remaining unpaid instalments due thereon.

8. The Trustee shall not be personally liable for any assessment made on the Trusteed Property held by it, or for any taxes or other governmental charges imposed upon the Trusteed Property, or upon the income therefrom, or upon it as Trustee hereunder, which it may be required to pay under any present or future law of the United States of America or of any state, county, municipality or other taxing authority therein, and if so required shall be entitled to reimburse itself from the dividends and/or distributions herein referred to, and/or from the Trusteed Property and/or be reimbursed by the Investors and/or the Company.

9. Any duty imposed upon the Trustee on or before a day certain shall, if such day certain falls on a Sunday or holiday, be considered as fulfilled if carried out on the next succeeding business day.

ARTICLE III.

CONCERNING INSURANCE ON THE LIVES OF INVESTORS.

The Company has arranged for life insurance upon the life of any Investor holding a Contract Certificate in the form attached hereto and marked Exhibit "C-1," under a

blanket life insurance policy, during the term of such Contract Certificate, or for a period of sixty days after any default by the Investor, provided the Investor be in good health and acceptable at the time of the execution of his Contract Certificate. Said policy provides that, subject to that limitation and to the terms, conditions and privileges set forth in said policy, upon receipt of due proof of death of the contract holder occurring while said policy is in force and while insured thereunder, the Insurance Company issuing such policy will pay to the Trustee the amount equal to the difference between the total amount of payments to be made by the contract holder under the terms of his Contract Certificate and the amount which the contract holder has paid thereunder, but in no event in excess of Twelve Thousand Dollars (\$12,000.). All policies of insurance shall be held by the Trustee and shall be payable to the Trustee and the premiums shall be paid by the Trustee, all as agent for the Company, but only when and as payments are made to the Trustee by the Investors or by someone on their behalf, in accordance with the terms of their Contract Certificates. The Trustee shall deduct from the payments made by the Investor holding a certificate accompanied by life insurance an amount for premiums for the account of the Company and pay the same as agent for the Company to the Insurance Company or Companies. The benefits of any life insurance policy will not be available to the Trustee or the Company if (a) the holder of the Contract Certificate shall commit suicide while either sane or insane within two years from the date of the Contract Certificate or (b) the holder of the Contract Certificate shall die while more than sixty days in default under his Contract Certificate, or (c) the holder of the Contract Certificate has made any material misstatements in his application for his Certificate, which application is to be a part of the Contract Certificate as though actually attached thereto.

In case of the death of any Investor and receipt by the Trustee of the proceeds of the policy of life insurance un-

der which the life of such Investor is insured, the Trustee shall within twenty days, apply such proceeds, with no further deductions, to the purchase of Trusteed Property at current market prices, and the Contract Certificate of the deceased Investor shall thereafter be available to the duly qualified personal representative or representatives of such deceased Investor upon its maturity, or sooner, upon exercise by him or them of the options for termination of any Contract Certificate prior to maturity provided for in the Trust Agreement.

ARTICLE IV.

CONCERNING THE TRUSTEE.

1. The Trustee shall not be in any way liable or responsible for anything done or omitted to be done by the Trustee hereunder in good faith, or for or in respect of any matter or thing in connection with this Trust Agreement, or with the Trusteed Property, except for the failure to exercise due care in the safekeeping and delivery of the Trusteed Property, or the proceeds thereof, as herein provided.
2. The Trustee does not assume or incur any liability, duty or obligation (other than as expressly provided for herein and in the Contract Certificates of the Company) to any Investor or to the Company, and the Trustee shall in no event be liable to any Investor or to the Company if, by reason of any present or future law of the United States of America or of any state thereof, this Trust Agreement or anything herein contained shall be declared invalid, or if for any cause not within its reasonable control the Trustee shall be in any way hindered, prevented or restrained from doing or performing any act or thing which it is required to do or perform by the terms of this Trust Agreement and/or the Contract Certificates.
3. The Trustee shall not be under any obligation to take any action toward the execution of any of the provisions of this Trust Agreement except its own covenants, or

to appear in, prosecute or defend any action, which action in its opinion may involve it in expense or liability, or sue for or collect the proceeds of any insurance policy, unless, as often as required by the Trustee, it shall, after request to the Company and/or the Investor, be furnished with reasonable security and indemnity against such expense or liability.

4. The Trustee may employ agents or attorneys-in-fact and shall not be answerable for the default or misconduct of any such agent or attorney if such agent or attorney shall have been selected with reasonable care, and the Trustee shall be fully protected in respect of any action under this **Trust Agreement** taken or suffered in good faith by the Trustee in accordance with the opinion of its counsel and in acting upon any resolution, vote, declaration, request, demand, order, notice, waiver, appointment, consent, certificate, affidavit, statement or market report or upon any other paper or document believed by it to be genuine, and to have been passed, signed, executed, acknowledged, verified, published or delivered by the proper party.

5. For proof of any fact, the Trustee may rely on a certificate with respect thereto signed by any two of the following officers, to wit: the President, a Vice-President, the Treasurer, the Secretary or an Assistant Secretary of the Company, and the Company may rely on a certificate with respect to any fact which has been signed by any two of the following officers, to wit: the President, a Vice-President, the Treasurer, the Secretary or an Assistant Secretary of the Trustee.

6. The person in whose name a Contract Certificate shall be registered shall for all purposes be deemed and regarded as the owner thereof and the Trustee shall not be affected by any notice to the contrary. In regard to distributing the share of the Trusteed Property and/or cash to which the Investor may be entitled or the proceeds of such Trusteed Property, the Trustee, without liability on

its part, shall be entitled to rely upon the orders received from the person in whose name such Contract Certificate is registered as to the distributions thereof.

7. The Trustee shall hold all moneys or Trusteed Property received by it hereunder and may deposit the same in its banking department until required to disburse same in accordance with the provisions of this Trust Agreement and the Contract Certificates; and the requirements and benefits of any rule of law or statute now or hereafter in force regarding the investment or segregation of trust funds are hereby waived with respect to such moneys or Trusteed Property. Nothing herein contained shall be deemed to require the Trustee to hold any part of the Trusteed Property for any particular Investor or to segregate the proportionate interest of any Investor in the Trusteed Property until Contract Certificates therefor shall be surrendered to the Trustee for cancellation.

8. All Trusteed Property purchased by the Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee or otherwise for the Investor, pursuant to the terms of this Trust Agreement or of the Contract Certificates or of any instructions received from the Investors, pursuant to any provision hereof, shall be purchased through such dealer or dealers in securities as shall be designated by the Company and approved by the Trustee and the Trustee shall be absolutely protected and incur no liability of any kind by reason of the purchase or sale of the Trusteed Property through such dealer or dealers as shall be designated by the Company in respect to the price paid or received therefor. The Trustee under no circumstances shall be liable for any delay in the purchase of any Trusteed Property except for wilful default.

9. The Trustee shall not be responsible or liable for the placing of any Life Insurance or for the terms and conditions of any policy issued on the life of any Investor or the sufficiency or responsibility of the Insurer nor shall

the Trustee in any event be responsible to any Investor or holder of a Contract Certificate by reason of any failure or inability of the Trustee to collect the proceeds of any policy of Life Insurance upon the death of any Investor.

ARTICLE V.

RESIGNATION OR REMOVAL OF TRUSTEE.

1. The Trustee at any time may resign upon six calendar months written notice to the Company and may be thereupon relieved from its obligations under this Trust Agreement with respect to any Contract Certificates issued after the effective date of such resignation by publishing a notice specifying a date when such resignation shall take effect, once a week for four successive calendar weeks (in each instance on any day or days of the week), in one daily newspaper published in the English language and of general circulation in the City of Philadelphia, State of Pennsylvania, the first publication in each newspaper to be made at least sixty days prior to the date specified in such notice on which such resignation shall take effect. Such resignation shall take effect on the day specified in such notice, unless prior to such date a successor trustee shall have been appointed as hereinafter provided.

Prior to the date specified by the Trustee in said notice when its resignation shall take effect, the Company by instrument executed under its corporate seal, by order of its Board of Directors, and mailed to the Trustee at its principal office in the City of Philadelphia and State of Pennsylvania, shall appoint a successor trustee to fill any vacancy caused by the resignation of the Trustee, such instrument to be accompanied by a statement in writing by the successor Trustee so appointed accepting such appointment. After such appointment by the Company, the successor trustee shall forthwith cause notice of its appointment to be published at least once a week for two successive calendar weeks (in each instance upon any day or days

of the week) in a daily newspaper published in the English language and of general circulation in said City of Philadelphia.

2. On written notice served upon the Trustee, the Company may remove the Trustee and/or any successor trustee and the Trustee so removed shall have no obligations hereunder with respect to Contract Certificates issued after the effective date of such removal. The removal of the Trustee shall take effect on the day specified in the notice thereof, which day shall not be less than sixty days from the date of such service, unless previous to the date so fixed in any such notice a successor trustee shall have been appointed and shall have accepted such appointment in the manner hereinbefore provided, in which event such removal shall take effect immediately upon the appointment and acceptance by such successor trustee. Upon the removal of the Trustee the Company shall appoint a successor trustee and shall advertise such removal and appointment in the manner provided in Section 1 of this Article V.

3. Every Trustee hereunder shall be a bank or trust company organized and existing under the laws of one of the states of the United States, or a national banking institution incorporated under the laws of the United States, having trust powers and a capital and surplus of at least two million dollars.

Upon the appointment of any successor trustee, all rights, powers and duties of the Trustee hereunder with respect to all Contract Certificates issued after the effective date of such appointment shall immediately vest in the new trustee without any further act, conveyance or transfer. All fees and disbursements of the retiring trustee if any, other than those deductible as hereinbefore set forth from payments to be made by the Investors, shall be paid at or prior to the time of the delivery by it of the Trusteed Property.

4. Every appointment of a new trustee shall be in writing and executed in triplicate, one copy thereof being filed with the Company, one copy with the successor trustee, and one copy with the retiring trustee, which shall also receive a duplicate copy of the written acceptance of the successor.

5. Any company into which the Trustee may be merged or with which it may be consolidated, or any company resulting from any merger or consolidation to which the Trustee shall be a party, shall be the successor of the Trustee hereunder without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything to the contrary notwithstanding; provided, however, that such new company shall be qualified as hereinbefore provided.

ARTICLE VI.

SUBSTITUTION OF TRUSTEED PROPERTY.

1. At any time at its option, and upon notice to the Trustee, the Company may substitute for Independence Trust Shares or for any other substituted Trusteed Property shares of a similar fixed investment trust having underlying securities of a standard nature and diversified in character, which said underlying securities are reasonably comparable to the securities underlying said Independence Trust Shares or, in case such shares are not available or the purchase of the same is impracticable, receipts of banks, trust companies or banking institutions approved by the Trustee, or certificates of deposit or of interest or of participation issued by banks, trust companies or banking institutions approved by the Trustee evidencing deposit of, or representing blocks of, underlying securities reasonably comparable to the securities underlying Independence Trust Shares in amounts or units reasonably comparable to certificates for Independence Trust Shares if, in the judgment of the Company, such latter investment would be more beneficial to the Investor, provided that, if certifi-

cates representing Trust Shares of a similar nature to Independence Trust Shares or such receipts or certificates of deposit or of interest or of participation be purchased, they shall involve fees for issuance and deposit or percentage for distribution and profit no greater than those charged by Independence Shares Corporation at the time of such substitution. The Company, upon any such substitution, shall notify the Trustee in writing concerning the same, giving full details in connection therewith, and all further investment of payments thereafter made under Contract Certificates shall be made by the Trustee in such substituted Trust Shares, receipts or certificates of deposit or of interest or of participation. The right of substitution herein given to the Company may be exercised by it from time to time and as often as may be necessary.

ARTICLE VII.

POWERS AND IMMUNITIES OF THE COMPANY AND ITS STOCKHOLDERS, ETC.

1. The Company may designate as dealers from whom Trusteed Property is to be purchased persons, firms and/or corporations who are, or any of the members of which are, officers, director and/or stockholders in the company, or who may have a controlling interest therein directly or indirectly, and shall incur no liability to any Investor or to the Trustee by so doing.
2. Upon substitution of any other Trusteed Property for Independence Trust Shares, as hereinabove provided, such substituted Trusteed Property may be issued and provided by the Company itself or by any other corporation or firm owned or controlled by the Company, or by any of its officers, directors and/or stockholders directly or indirectly.
3. In the event that there is a substitution of Trusteed Property for Independence Trust Shares, as hereinabove

in Article VI provided, the Company shall incur no liability to any Investor or to the Trustee by so doing.

4. No recourse under or upon any obligation or agreement contained in this Trust Agreement or in the Contract Certificates shall be had against any incorporator, stockholder, officer or director, present or future, of the Company, or of any successor company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise, it being expressly agreed and understood that this Trust Agreement and the Contract Certificates are solely corporate obligations and that no personal liability whatever shall attach to or be incurred by the incorporators or by any past, present or future stockholders, officers or directors of the Company or any successor company.

ARTICLE VIII.

TERMINATION OF THE TRUST AGREEMENT.

1. In case one or more of the following events shall happen, that is to say, (1) if the Trustee resigns or is removed and the Company is unable to, or does not, procure a successor Trustee because of a refusal to accept the Trust hereby created; (2) if the Company shall, by written notice to the Trustee, declare this Trust Agreement terminated either forthwith or upon such date as may be set forth in such notice, not, however, exceeding sixty days from delivery thereof; (3) in any event, ten years prior to the termination of a Deed of Trust dated April 2, 1930, entered into by and between Independence Shares Corporation and The Pennsylvania Company for Insurances on Lives and Granting Anuities, or ten years prior to the termination of any extension thereof; provided, however, that, in the event a substitution of Trusted Property be effected under Article VI of this Trust Agreement, ten years prior to the termination of such Deed or Deeds of Trust, or any extension or extensions thereof, securing such

substituted Trusteed Property; then and in every such case this Trust Agreement shall be considered terminated and no more Contract Certificates shall be issued under the terms of this Trust Agreement, but no such termination shall affect the right of the Investor to continue his Contract Certificate to maturity in accordance with the Terms thereof and of this Trust Agreement, if he so desires, without said continuance being affected in any way by such termination.

2. If for any reason whatsoever Independence Trust Shares or any Trusteed Property substituted therefor shall cease to be available for purchase by the Trustee and the Company shall, for a period of sixty days after notice thereof from the Trustee, fail or refuse to provide other Trust Shares, receipts or certificates of deposit or of interest or of participation, as hereinbefore in Article VI provided, then and in such event the Trustee shall select for investment such shares, receipts or certificates of deposit or of interest or of participation as are available on the market which, in the opinion of the Trustee, represent blocks of underlying securities comparable to the securities underlying Independence Trust Shares and shall give notice to the Investor of such selection and, unless the Investor within thirty days thereafter advises the Trustee that he agrees to the substitution and purchase of such shares, receipts or certificates of deposit or of interest or of participation, the Contract Certificate shall be automatically terminated, subject to all of the provisions of this Trust Agreement with respect to termination as though a notice of termination had been filed by the Investor with the Trustee.

3. If for any reason Independence Trust Shares, or such other Trusteed Property as may have been substituted therefor in accordance with the provisions of this

Trust Agreement, shall be available for purchase only at a price which the Trustee shall deem unreasonable, the Trustee may, but shall in no event be obligated to, give notice thereof to the Company, and within sixty (60) days after receipt of such notice the Company may substitute other Trust Shares or other securities in accordance with the provisions of Article VI hereof. If the Company shall fail to provide such substituted Trusteed Property within sixty (60) days after receipt of such notice, the Trustee may, but shall not be obligated to, select as substituted Trusteed Property hereunder such shares, receipts or certificates of deposit or of interest or of participation, as hereinabove in Article VI hereof described, as are available on the market, and which, in the opinion of the Trustee, represent blocks of underlying securities comparable to the securities underlying Independence Trust Shares, and shall give notice to each Investor of such selection. If within thirty (30) days after such notice has been given by the Trustee the Investor shall advise the Trustee in writing of his consent thereto, the trust shares, receipts or certificates of deposit or of interest or of participation so selected by the Trustee shall be substituted as in the case of Trusteed Property substituted by the Company under the provisions of Article VI hereof. Unless the Trustee shall receive such written consent within thirty (30) days after notice of such substitution shall have been given, the Contract Certificate of the Investor so refusing or failing to consent shall be automatically terminated, subject to all of the provisions of this Trust Agreement with respect to termination, as though notice of termination had been filed by the Investor with the Trustee, but the Investor shall have no right to reinstate his Contract Certificate after such thirty (30) day period.

During the sixty (60) day period hereinabove referred to, or unless sooner notified by the Company of a substitution of Trusteed Property, the Trustee shall invest all pay-

ments received in Trusteed Property, notwithstanding such notice to the Company. During the thirty (30) day period hereinabove referred to, unless sooner notified by the Investor of his agreement to such substitution, the Trustee shall not invest any payments received from any Investor in Trusteed Property, but shall hold the same for the account of the Investor.

ARTICLE IX.

AMENDMENTS AND SUPPLEMENTAL AGREEMENTS.

1. The Company and the Trustee, without notice to or consent of the holders of Contract Certificates, are hereby authorized to join in the execution of any Supplemental Trust Agreement or Agreements and to make such further covenants and conditions therein in relation to this Trust Agreement not inconsistent with the general terms hereof as may be necessary or desirable to carry out the intent and purposes of this Trust Agreement and the provisions of the Contract Certificates now issued, and to join in the execution of any amendment or amendments altering, changing, restricting or enlarging any and/or all of the provisions of this Trust Agreement; always provided, however, that no such alteration, change, restriction or enlargement shall affect the rights of the holders of Contract Certificates issued prior to the date of such alteration, change, restriction or enlargement.

ARTICLE X.

DEFINITIONS AND GENERAL PROVISIONS.

1. The term "Investor" and any reference thereto shall be taken to include the feminine as well as the masculine gender and shall also be taken to include the executors, administrators or other legal representatives of a deceased holder of the Contract Certificate.

The term "Trust Agreement," as used herein, shall include this Trust Agreement and every agreement supplemental thereto which may be entered into by the Company and the Trustee subsequent to the date hereof.

The term "Trustee" shall be construed to mean the Trustee hereunder for the time being, whether the original Trustee or a successor.

The term "Company" shall be taken to mean Capital Savings Plan, Inc., organized and existing under the laws of the State of Pennsylvania, or any successor of such corporation formed pursuant to the reorganization, consolidation or merger of such corporation, and this Trust Agreement shall inure to the benefit of and bind any such successor corporation.

The term "Trusted Property" shall be taken to include Independence Trust Shares and/or any trust shares or receipts or certificates of deposit or of interest or of participation substituted therefor, as provided in Article VI hereof, which may be purchased by the Trustee and held by it under the terms of this Trust Agreement.

2. Notice of the election by any Investor of any option herein provided for shall be in writing and delivered to the Trustee before the same shall be considered as made and, when so delivered, shall be irrevocable and shall constitute full and complete authority to the Trustee to carry out on behalf of the Investor the option elected by him.

3. The Contract Certificates herein provided for shall not be transferable, but any Investor may at any time before the maturity of his Contract Certificate designate any person or persons who, upon the maturity of his Certificate, shall be entitled to all the rights and interest appertaining thereto when matured. Such designation shall be in writing delivered to the Trustee and may be revoked at any time before maturity by the Investor without the consent or consents of the person or persons designated by him.

4. The Investor, by becoming a party to this Trust Agreement, appoints the Trustee his true and lawful attorney to perform and carry out the terms hereof and to purchase, hold, sell and/or transfer in the manner, for the purposes and at the times herein set forth that portion of the Trusteed Property to which the Investor is or may become entitled, hereby ratifying and confirming all that his said attorney shall lawfully do by virtue hereof.

5. The provisions hereof shall be construed according to, and all rights hereunder shall be governed by, the laws of the State of Pennsylvania.

6. Any notice to be given to the Company hereunder shall be duly given if mailed or delivered to the Company at such address as shall be specified by the Company to the Trustee in writing.

7. Any notice to be given to the Trustee hereunder shall be duly given if mailed to the Trustee at its principal office in the City of Philadelphia and State of Pennsylvania.

8. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and all of which taken together shall be deemed one and the same instrument. An executed copy of this Trust Agreement shall be permanently on file at the principal office of the Trustee and shall be open to inspection by any Investor at any reasonable time or times.

IN WITNESS WHEREOF, Capital Savings Plan, Inc., has caused this Trust Agreement to be executed in its name by its President and its corporate seal to be hereunto affixed and attested by its Secretary; and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee as aforesaid, has caused this Trust Agreement to be executed in its name by one of its Vice-Presidents and its

corporate seal to be hereunto affixed and attested by its Secretary or an Assistant Secretary on the day and year first above written.

CAPITAL SAVINGS PLAN, INC.,

By ALFRED H. GEARY,
President.

(Corporate)
(Seal)

Attest:-

Hazleton Mirkil,
Secretary.

THE PENNSYLVANIA COMPANY
FOR INSURANCES ON LIVES
AND GRANTING ANNUITIES,

By C. P. LINEAWEAVER,
Vice-President.

(Corporate)
(Seal)

Attest:

L. J. Clark,
Secretary.

EXHIBIT C.**Instalment Contract Certificate Without Insurance.**

Amount	No.
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CAPITAL SAVINGS PLAN, INC.

(Organized under the Laws of Pennsylvania.)

CONTRACT CERTIFICATE.**Non-Negotiable.**

AGREEMENT made by and between CAPITAL SAVINGS PLAN, INC. (hereinafter called "Company"), and (hereinafter called "Investor"),

WHEREAS, the Investor desires to become a party to a certain Agreement of Trust, dated 1932, entered into between the Company and The Pennsylvania Company for Insurances on Lives and Granting Annuities as Trustee and such persons as may from time to time become parties thereto (hereinafter called the "Trust Agreement"), wherein it is provided that the Investor shall make monthly cash payments to the Trustee over a period of ten years for investment in Independence Trust Shares or, as provided in said Trust Agreement, in other trust shares or receipts of banks, trust companies or banking institutions or certificates of deposit or of interest or of participation evidencing deposit of, or representing blocks of, underlying securities reasonably comparable to the securities underlying Independence Trust Shares (hereinafter called "Trusteed Property"); and

WHEREAS, said Trust Agreement provides that the Investor, by purchasing an agreement in the form of this agreement upon authentication thereof on behalf of the Trustee, shall become a party to said Trust Agreement and become entitled to all the rights and privileges, limitations and conditions therein set forth;

Now, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, this agreement WITNESSETH:

The Investor agrees to pay to the Trustee

() per month on or before the day of each month, commencing the day of , 19 , for a period of ten years from date of the first payment, such payments to be made at the times herein specified at the principal office of the Trustee, Fifteen and Chestnut Streets, Philadelphia, Pennsylvania, or at such other place as the Trustee may in writing from time to time direct.

The Trustee will apply all payments made from time to time hereunder to the purchase of Trusteed Property in the manner and at the time set forth in the Trust Agreement, less amounts to be deducted therefrom as set forth in the Trust Agreement as follows: (a) From each monthly instalment paid, a sum not in excess of 1/48 of 1% of the face amount of this Contract Certificate, which shall be retained by the Trustee to provide for the expense of administering the Trust hereby created, including the compensation of the Trustee; (b) From the first twelve monthly instalments paid, a sum in the aggregate not in excess of 5% of the face amount of this Contract Certificate, which shall be paid by the Trustee to the Company as its full service charge for the entire period during which this Contract Certificate shall continue in force said service charge to be deducted from all or any such instalments in such proportion as the Company shall from time to time in writing direct.

Upon completion of all payments agreed to be made by the Investor to the Trustee, or upon any earlier termination of this Contract Certificate in the manner set forth in the Trust Agreement, the Investor may, upon surrender of this Contract Certificate, demand and receive his share of Trustee Property purchased for his account, or may direct the sale thereof and receive the proceeds, all in the

manner and subject to the terms set forth in said Trust Agreement.

Until such time as this Contract Certificate shall be terminated in any manner provided for in said Trust Agreement, the Trusteed Property purchased for the account of the Investor shall be held by the Trustee, pursuant to the terms of the Trust Agreement.

This contract certificate is subject in all respects to the terms and conditions set forth in said Trust Agreement to which reference is hereby made as fully and completely as though all the terms and conditions thereof were specifically set forth herein.

The Company reserves the right to terminate this Contract Certificate in the manner and upon the conditions set forth in the Trust Agreement.

This Contract Certificate shall not be valid or become obligatory until it shall have been authenticated by a duly authorized officer of The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee.

IN WITNESS WHEREOF, the Company has caused this Contract Certificate to be duly executed by the faesimile signature of its President and its corporate seal duly affixed, attested by its Seeretary or Assistant Secretary, this

day of , 19 .

CAPITAL SAVINGS PLAN, INC.

By

.....
President.

Attest:

.....
Seeretary.

The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, hereby certified that this is a Contract Certificate of Capital Savings Plan, Inc., described in the within mentioned Trust Agreement, and that the above named Investor is registered on the Registry Books of Capital Savings Plan, Inc. kept by the Trustee at its office, Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania, as the holder of Certificate No. , of Series

THE PENNSYLVANIA COMPANY
FOR INSURANCES ON LIVES
AND GRANTING ANNUITIES,
TRUSTEE,

By

.....
Vice-President.

EXHIBIT C-1.**Instalment Contract Certificate Accompanied
By Insurance.**

Amount	No.
--------	-----

CAPITAL SAVINGS PLAN, INC.

(Organized under the Laws of Pennsylvania.)

CONTRACT CERTIFICATE.

Non-Negotiable.

AGREEMENT made by and between CAPITAL SAVINGS PLAN, INC. (hereinafter called "Company"), and

called "Investor"), (hereinafter

WHEREAS, the Investor desires to become a party to a certain Agreement of Trust, dated , 1932, entered into between the Company and The Pennsylvania Company for Insurances on Lives and Granting Annuities as Trustee and such persons as may from time to time become parties thereto (hereinafter called the "Trust Agreement"), wherein it is provided that the Investor shall make monthly cash payments to the Trustee over a period of ten years for investment in Independence Trust Shares or, as provided in said Trust Agreement, in other trust shares or receipts of banks, trust companies or banking institutions or certificates of deposit or of interest or of participation evidencing deposit of, or representing blocks of, underlying securities reasonably comparable to the securities underlying Independence Trust Shares (hereinafter called "Trusteed Property"); and

WHEREAS, said Trust Agreement provides that the Investor, by purchasing an agreement in the form of this agreement upon authentication thereof on behalf of the

1 Trustee, shall become a party to said Trust Agreement and become entitled to all the rights and privileges, limitations and conditions therein set forth;

Now, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, this agreement WITNESSETH:

The Investor agrees to pay to the Trustee

Dollars (\$) per month on
or before the day of each month commencing the day of

, 19 , for a period of ten (10) years from the date of the first payment, such payments to be made at the times herein specified at the principal office of the Trustee, Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania, or at such other place as the Trustee may in writing from time to time direct.

The Trustee will apply all payments made from time to time hereunder to the purchase of Trusteed Property in the manner and at the time set forth in the Trust Agreement, less the deductions as set forth in the Trust Agreement as follows: (a) From each monthly instalment paid, a sum not in excess of 1/48th of 1% of the face amount of each Contract Certificate, which shall be retained by the Trustee to provide for the expense of administering the Trust hereby created, including the compensation of the Trustee; (b) From each monthly instalment paid, a sum sufficient to discharge the insurance premiums on the life insurance policy accompanying this Contract Certificate as they become due, which the Trustee shall pay as agent for the Company to the Insurance Company; (c) From the first twelve monthly instalments paid, a sum in the aggregate not in excess of 5% of the face amount of each Contract Certificate, which the Trustee shall forthwith pay over to the Company to be retained by the Company as its full service charge for the entire period during which this Contract Certificate shall continue in force, said service charge to be deducted from

all or any such instalments in such proportion as the Company shall from time to time in writing direct.

Upon completion of all payments agreed to be made by the Investor to the Trustee, or upon any earlier termination of this Contract Certificate in the manner set forth in the Trust Agreement, the Investor may, upon surrender of this Contract Certificate, demand and receive his share of Trusteed Property purchased for his account or may direct the sale thereof and receive the proceeds, all in the manner and subject to the terms set forth in said Trust Agreement.

Until such time as this Contract Certificate shall be terminated in any manner provided for in said Trust Agreement, the Trusteed Property purchased for the account of the Investor shall be held by the Trustee, pursuant to the terms of the Trust Agreement.

The Company has arranged for life insurance upon the life of the holder of this Contract Certificate under a blanket life insurance policy during the term of this Contract Certificate or for a period of sixty days after any default in the payments herein provided for. Said policy provides that, subject to the terms, conditions and privileges set forth in said policy, upon receipt of due proof of death of the Contract holder occurring while said policy is in force and while insured thereunder, the Insurance Company issuing such policy will pay to the Trustee the amount equal to the difference between the total amount of payments to be made by the Contract holder under the terms hereof and the amount which the Contract holder has paid hereunder, but in no event in excess of Twelve Thousand Dollars (\$12,000.). The policy of insurance whereby the life of the Investor holding this Certificate is insured shall be held by the Trustee and shall be payable to the Trustee, and the premiums thereon shall be paid by the Trustee, all as agent for the Company, but only when and as payments are made to the Trustee by the Investor or someone on his behalf, in accordance with the Terms of this Contract Certificate. The Trustee shall deduct from the payments made by the

Investor an amount for premiums for the account of the Company and pay the same as agent for the Company to the Insurance Company or Companies. The benefits of the life insurance policy will not be available to the Trustee or the Company if (a) the holder of this Contract Certificate shall commit suicide while either sane or insane within two years from the date hereof, or (b) the holder of this Contract Certificate shall die while more than sixty days in default under the terms hereof, or (c) the holder of this Contract Certificate has made any material misstatement in his application for this Certificate which application is intended to be a part of this Contract Certificate as though actually attached hereto.

On the death of the Investor and receipt by the Trustee of the proceeds of the policy of life insurance upon his life, the Trustee shall within twenty days apply such proceeds, with no further deductions, to the purchase of Trusteed Property, as provided in the Trust Agreement, and the duly qualified personal representative or representatives of the Investor shall be entitled to the options provided in the Trust Agreement for the termination of any Contract Certificate prior to maturity.

This Contract Certificate is subject in all respects to the terms and conditions set forth in said Trust Agreement to which reference is hereby made as fully and completely as though all the terms and conditions thereof were specifically set forth herein.

The Company reserves the right to terminate this Contract Certificate in the manner and upon the conditions set forth in the Trust Agreement.

This Contract Certificate shall not be valid or become obligatory until it shall have been authenticated by a duly authorized officer of The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee.

IN WITNESS WHEREOF, the Company has caused this Contract Certificate to be duly executed by the facsimile

signature of its President and its corporate seal duly affixed, attested by its Secretary or Assistant Secretary, this day of , 19 .

CAPITAL SAVINGS PLAN, INC.

By

.....
President.

Attest:

.....
Secretary.

The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, hereby certifies that this is a Contract Certificate of Capital Savings Plan, Inc., described in the within mentioned Trust Agreement, and that the above named Investor is registered on the Registry Books of Capital Savings Plan, Inc. kept by the Trustee at its office, Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania, as the holder of Certificate No. , of Series .

**THE PENNSYLVANIA COMPANY
FOR INSURANCES ON LIVES
AND GRANTING ANNUITIES,
TRUSTEE,**

By

.....

EXHIBIT D.

In case of a Contract Certificate which is a full paid Contract Certificate by reason of the lump sum payment of the full face amount of such Contract Certificate, or by reason of the conversion of an instalment Contract Certificate, through the application of the proceeds of any life insurance policy, or the lump sum payment of all instalments then remaining due and unpaid, the Certificate in the form set forth in Exhibit "C" shall also contain the following Certificate executed by the Trustee:—

In consideration of the payment of the full face amount due under the terms hereof, receipt whereof is hereby acknowledged, the within Contract Certificate is converted into a full paid Contract Certificate and the owner entitled to all rights and privileges under the within mentioned Trust Agreement without further payment. To evidence such fact, The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, has caused this Certificate to be executed by its authorized officer and the within Contract Certificate to be stamped "FULL PAID" across the face thereof.

THE PENNSYLVANIA COMPANY
FOR INSURANCES ON LIVES
AND GRANTING ANNUITIES,
TRUSTEE,

By

.....
Vice-President.

SUPPLEMENTAL TRUST AGREEMENT.

SUPPLEMENTAL TRUST AGREEMENT, dated December 3rd, 1932, by and between CAPITAL SAVINGS PLAN, INC., a corporation organized and existing under the laws of the State of Pennsylvania, (hereinafter called the "Company"), party of the first part; THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, a corporation organized and existing under the laws of the State of Pennsylvania, (hereinafter called the "Trustee"), party of the second part; and THOSE PERSONS who from time to time become parties hereto by purchasing, or by previously having purchased, Contract Certificates of Capital Savings Plan, Inc., issued pursuant to the terms of an Agreement dated August 9, 1932, between the parties hereto, (such persons being hereinafter called "Investors"), parties of the third part;

WHEREAS, the Company and the Trustee have executed and delivered their Trust Agreement dated August 9, 1932, (hereinafter referred to as the Original Trust Agreement), each to the other, wherein it is provided that the Company may sell Contract Certificates upon an instalment basis to the Investors, and the payments so made upon such Certificates shall be made to the Trustee to be invested by the Trustee for the account of the Investors in certain Trusteed Property, more particularly described in said Original Trust Agreement; and

WHEREAS, it is the desire of the Company and the Trustee to make certain additions and supplements thereto pursuant to the power and authority conferred upon and reserved to them under and by virtue of the provisions of the Original Trust Agreement and, pursuant to due corporate action, have determined to make, execute and deliver a Supplemental Trust Agreement in the form hereof for the purposes herein provided; and

WHEREAS, the Company and the Trustee have authority to execute and deliver this Trust Agreement and have duly authorized the execution and delivery thereof; and

WHEREAS, it is intended by and between all of the parties hereto that all of the Articles, Sections, terms and conditions of said Original Trust Agreement shall continue in full force and effect.

Now, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, and in order to further declare all terms and conditions relating to the Trusteed Property and to the holding thereof in Trust by the Trustee, the parties hereto, each for itself and himself and not on behalf of any other party, agree each with the other as follows:

ARTICLE I.

OBLIGATIONS AND RIGHTS OF THE INVESTOR.

1. In addition to and as a supplement of Section 4, of Article II of the Original Trust Agreement, the Investor shall have the further option, upon completion of the installments payable by any Investor holding a Contract Certificate in the form attached to said Original Trust Agreement and marked Exhibit "C" or "C-1", to (e) direct the Trustee, in writing, to hold the portion of Trusteed Property to which he is entitled for a period of ten years from the date of such completion, in Trust, for the account of the Investor. During such extended period, the Trustee shall collect all payments, dividends and/or distributions from time to time made upon the Trusteed Property and all other obligations and rights of the Company, the Trustee and the Investor shall continue and be the same as they were prior to the exercise of such option by the Investor. At the end of such extended period, the Trustee shall notify the Investor, in writing, of such fact, and thereupon the Investor shall have the options as set forth in Section 4, of Article II of said Original Trust Agreement.

During each year of such extended period, the Trustee shall be entitled to deduct from all payments, dividends and/or distributions from time to time made upon the Trusteed Property a sum not in excess of two-tenths of one per cent (2/10 of 1%) per annum of the face amount of such Contract Certificate as its charge and compensation for the expense of administering the Trust during such period.

Any Investor, upon the completion of the payments payable under his Contract Certificate and upon the exercise of this option (c), shall be entitled to the option provided in Section 2 of this Supplemental Trust Agreement.

2. In addition to and as a supplement of Section 7, of Article II of said Original Trust Agreement, relating to full paid Contract Certificates, the Investor holding such Certificate shall have the right at his option to direct the Trustee, in writing, to pay over to such Investor all or any part of the cash distributions from time to time made to the Trustee upon the Trusteed Property, and thereupon the Trustee shall forthwith pay over such sums so directed to be paid to the Investor. After receipt of such notice, the Trustee shall continue to make such payments to the Investor as and when such cash is received by the Trustee as distribution upon the Trusteed Property until such time as the Investor shall, in writing, notify the Trustee to discontinue such payments. The Investor shall have no right to direct the Trustee to pay over to him any distributions made to the Trustee upon the Trusteed Property other than those made in cash.

In the event the Investor exercises the option provided in this Section 2, and has exercised option (c) provided for in Section 1 of this Supplemental Agreement, the Trustee shall have the right, before making such payment, to first deduct the two-tenths of one per cent (2/10 of 1%) per annum of the face amount of such Contract Certificate as its charge and compensation for the expense of administer-

ing the trust during such period as provided in Paragraph 2, of Section 1 of this Supplemental Trust Agreement.

3. It is understood and agreed between all of the parties hereto that all of the Articles, Sections, terms and conditions of said Original Trust Agreement shall continue in full force and effect.

4. It is understood and agreed between all of the parties hereto that all of the rights and benefits conferred by this Supplemental Trust Agreement shall inure and extend to those Investors who have purchased Contract Certificates from and after August 9, 1932.

IN WITNESS WHEREOF, Capital Savings Plan, Inc. has caused this Supplemental Trust Agreement to be executed in its name by its President and its corporate seal to be hereunto affixed and attested by its Secretary; and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee as aforesaid, has caused this Supplemental Trust Agreement to be executed in its name by one of its Vice-Presidents and its corporate seal to be hereunto affixed and attested by its Secretary or an Assistant Secretary, on the day and year first above written.

CAPITAL SAVINGS PLAN, INC.
By A. H. GEARY,
President.

(Corporate Seal)

Attest:

Robert A. Bonner,
Secretary.

THE PENNSYLVANIA COMPANY FOR
INSURANCES ON LIVES AND GRANTING
ANNUITIES

By FRANK G. SAYRE,
Vice-President.

(Corporate Seal)

Attest:

Lewis M. Evans,
Asst. Secretary.

SECOND SUPPLEMENTAL TRUST AGREEMENT

SECOND SUPPLEMENTAL TRUST AGREEMENT, dated February 19, 1934, by and between CAPITAL SAVINGS PLAN, INC., a corporation organized and existing under the laws of the State of Pennsylvania, (hereinafter called the "Company"), party of the first part; THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, a corporation organized and existing under the laws of the State of Pennsylvania, (hereinafter called the "Trustee"), party of the second part; and THOSE PERSONS who from time to time become parties hereto by purchasing, or by previously having purchased, Contract Certificates of Capital Savings Plan, Inc., issued pursuant to the terms of an Agreement dated August 9, 1932, between the parties hereto, (such persons being hereinafter called "Investors"), parties of the third part;

WHEREAS, the Company and the Trustee have executed and delivered their Trust Agreement dated August 9, 1932, (hereinafter referred to as the Original Trust Agreement) and their Supplemental Trust Agreement dated December 3, 1932, (hereinafter referred to as the First Supplemental Trust Agreement), each to the other, wherein it is provided that the Company may sell Contract Certificates upon an instalment basis to the Investors, and the payments so made upon such Certificates shall be made to the Trustee to be invested by the Trustee for the account of the Investors in certain Trusteed Property, more particularly described in said Original Trust Agreement; and

WHEREAS, it is the desire of the Company and the Trustee to make certain further additions and supplements to the said Original Trust Agreement pursuant to the power and authority conferred upon and reserved to them under

and by virtue of the provisions of the said the Original Trust Agreement and, pursuant to due corporate action, have determined to make, execute and deliver a Second Supplemental Trust Agreement in the form hereof for the purposes herein provided; and

WHEREAS, the Company and the Trustee have authority to execute and deliver this Second Supplemental Trust Agreement and have duly authorized the execution and delivery thereof; and

WHEREAS, it is intended by and between all of the parties hereto that all of the Articles, Sections, terms and conditions of said Original Trust Agreement and said First Supplemental Trust Agreement, except as herein altered or modified, shall continue in full force and effect.

Now, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, and in order to further declare all terms and conditions relating to the Trusteed Property and to the holding thereof in Trust by the Trustee, the parties hereto, each for itself and himself and not on behalf of any other party, agree each with the other as follows:

ARTICLE I.

OBLIGATIONS AND RIGHTS OF THE INVESTOR.

1. Section 1 of Article II of the Original Trust Agreement is modified and amended so that the same shall read as follows:

"1. The Investor shall become a party to this Trust Agreement by becoming the purchaser of a Contract Certificate and shall make the payments to the Trustee called for by his Contract Certificate at the times and at the place set forth therein, without notice by the Trustee or the Com-

pany as to any instalment other than as set forth in the Contract Certificate. The Trustee, upon receipt of each payment, shall, provided such shares be available for purchase, apply the same, less the deductions hereinafter provided for, not later than twenty days from the day on which such payment is due to the purchase at current market prices of Independence Trust Shares issued under an Agreement and Declaration of Trust between Independence Shares Corporation and The Pennsylvania Company for Insurances on Lives and Granting Annuities, dated as of April 2, 1930, or such other Trust Shares as the Company, as hereinafter in Article VI provided, may substitute for Independence Trust Shares. All Independence Trust Shares (or substituted Trust Shares) so purchased shall be registered in the name of the Trustee or its nominee. The Trustee shall not be required to receipt to the Investor for any monthly payment made by him. The Trustee shall deduct from the monthly instalments received by the Trustee from the Investor, to cover all legal, administrative and collection expenses and the cost of life insurance in the case of a Contract Certificate accompanied by life insurance, the following: (a) from each monthly instalment paid, a sum not in excess of Twenty-five cents (\$.25) for each \$10 payment or fraction thereof, which shall be retained by the Trustee to provide for the expense of administering the Trust hereby created, including the compensation of the Trustee; (b) from each monthly instalment paid on a Contract Certificate accompanied by life insurance, a sum sufficient to discharge the insurance premiums as they become due, which the Trustee shall pay as agent for the Company to the Insurance Company; (c) from the first twelve monthly instalments paid, a sum in the aggregate not in excess of 5% of the face amount of each Contract Certificate which shall be paid by the Trustee to the Company to be retained by the Company as its full service charge for the entire period during which the Contract Certificate shall continue in force, said service charge to be deducted from

all or any such instalments in such proportion as the Company shall from time to time in writing direct. The balance if any remaining in the hands of the Trustee from each monthly instalment, after making the deductions hereinabove provided for, shall be invested by the Trustee for the account of the Investor. The Company shall in no event be liable or accountable to the Trustee or the Investor, nor shall the Investor have any right to, nor shall the Company be obligated for the repayment to the Investor of any part of the sums so paid to the Company hereunder."

2. In addition to and as a supplement of Article II of the Original Trust Agreement, any Investor who shall not be in default with respect to any payments due and owing under the terms of his Contract Certificate may give written notice to the Trustee of his desire to accept delivery of the Trusteed Property, or any part thereof, which up to that time has been purchased for his benefit and in such event and upon payment to the Trustee of \$2.00 to be retained by it as its fee for complying with said notice and of the amount required for necessary transfer stamps and other transfer charges required to be paid by the Trustee, the Trustee shall proceed to obtain transfer of said Trusteed Property into his name, or into the name of his nominee, and to make delivery of the same, provided however, that the Trustee shall retain any fractional shares as Trusteed Property for the benefit of the Investor. Thereafter the Investor shall continue his payments in accordance with his Contract Certificate and the Trustee shall invest the same less deductions, in Trusteed Property under the terms of this Trust Agreement as though the Investor had not withdrawn any part of the Trusteed Property. Before any Investor shall be entitled to receive any Trusteed Property under this provision, he shall be required to surrender his Contract Certificate to the Trustee for the purpose of noting thereon delivery of Trusteed Property to him.

3. Section 7 of Article II of the Original Trust Agreement is modified and amended so that the same shall read as follows:

"7. In case of a Full Paid Contract Certificate, the Trustee shall forthwith apply the payment made thereon (Less a sum not in excess of two and one-half per cent. (2½%) of the face amount of such Contract Certificate to be paid by the Trustee to the Company as its full service charge for the entire period during which the Contract Certificate shall continue in force; provided, however, in the event an instalment Contract Certificate is converted into a full paid Contract Certificate pursuant to the terms of this Trust Agreement, the Investor shall be entitled to a credit for but shall not be entitled to be reimbursed for, any deductions made previous thereto, pursuant to the terms of Section 1 of this Article II) to the purchase of Trusteed Property, and shall continue to hold the same for the benefit of the Investor owning such full paid Contract Certificate. All distributions upon the Trusteed Property applicable to such full paid Contract Certificate shall be collected by the Trustee and applied to the purchase of additional Trusteed Property until maturity of such full paid Contract Certificate (which shall be ten years from the date thereof) or earlier termination thereof. From and after the date at which a Contract Certificate shall be full paid the Trustee shall deduct from all payments, dividends and/or distributions from time to time made upon such Trusteed Property, a sum not in excess of two-tenths of one per cent. (2/10 of 1%) per annum of the face amount of such Contract Certificate as its charge and compensation for the expense of administering the Trust during the time that said Full Paid Contract Certificate shall continue in force in lieu of but in addition to the deductions if any theretofore made for the account of the Trustee under the provisions of Article II, Section 1 (a). Any full paid Contract Certificate may be terminated at any time and

either option set forth in Section 4 of this Article II shall thereupon be available to such Investor. Any Investor may at any time convert an instalment Contract Certificate into a full paid Contract Certificate by paying to the Trustee the aggregate of all remaining unpaid instalments due thereon."

ARTICLE II.

DEFINITIONS AND GENERAL PROVISIONS.

1. In addition to and as a supplement of Article X of said Original Trust Agreement, any Contract Certificate, if in force and not cancelled on the books of the Trustee, may be assigned to any individual acceptable to the Company, but the Assignment or transfer thereof shall not be valid without the consent in writing endorsed thereon by the Company after proper application has been made and \$1.00 has been paid to the Company to be retained by it as its service fee, and the Assignee has endorsed thereon his acceptance of the terms of said Contract Certificate and the Company shall have duly notified the Trustee of its approval of said Assignment. From then and thereafter the Assignor-Investor shall be relieved and discharged of all obligations and duties under, and shall have no further rights or interests in, his Contract Certificate or this Trust Agreement, and the Assignee-Investor shall be deemed and taken to have become substituted in the place and stead of the Assignor-Investor. Upon such Assignment and consents, the insurance benefits, if any, in said Contract Certificate will terminate as to the investor but the said insurance benefits will be extended to the Assignee subject to the approval of the Company and of the Trustee and upon proof of insurability satisfactory to the Insurance Company. In the event that such Assignee is unable to obtain the benefit of any insurance accompanying the Contract Certificate assigned to him, the deductions from the payments to be made by the Assignee-Investor under the

terms of this Trust Agreement after the date of such Assignment shall be the same as though said Contract Certificate was not originally accompanied by life insurance.

2. Section 3 of Article X of said Original Trust Agreement is amended so that the same shall read as follows:

“3. Any Investor holding a Contract Certificate issued prior to the date hereof may at any time before the maturity of his Contract Certificate designate any person or persons, who upon the maturity of his Contract Certificate, shall be entitled to all the rights and interests pertaining thereto when matured. Such designation shall be in writing delivered to the Trustee and may be revoked at any time before maturity by the Investor without the consent or consents of the person or persons designated by him. Any assignment of such a Contract Certificate under the terms of this Trust Agreement shall automatically revoke any designation under the terms of this paragraph made prior to the date of such assignment. Investors holding Contract Certificates issued after the date hereof shall not have the right to designate a beneficiary or beneficiaries as above set forth.”

It is understood and agreed between all of the parties hereto that all the Articles, Sections, terms and conditions of said Original Trust Agreement and of said First Supplemental Trust Agreement shall continue in full force and effect, except as herein expressly modified or amended and that all the rights and benefits conferred by this Second Supplemental Trust Agreement shall inure and extend to those Investors who have purchased Capital Savings Plan Contract Certificates from and after August 9, 1932.

IN WITNESS WHEREOF, Capital Savings Plan, Inc. has caused its corporate seal to be hereunto affixed, attested by its officers thereunto duly authorized, and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee as aforesaid, has caused this Agreement to be executed in its name by one of its Vice-Presi-

dents and its corporate seal to be hereunto affixed and attested by its Assistant Secretary, the day and year first above written.

CAPITAL SAVINGS PLAN, INC.

(Corporate Seal)

By ALFRED H. GEARY

President

Attest:

ROBERT A. BONNER

Secretary

THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES

(Corporate Seal)

By FRANK G. SAYRE

Vice-President

Attest:

LEWIS M. EVANS

Ass't Secretary

WELLINGTON TRUST AGREEMENT.

THIS AGREEMENT, dated as of July 15, 1935, by and between WELLINGTON FOUNDATION, INC., a corporation organized under and existing by virtue of the laws of the State of Delaware (hereinafter referred to as "Foundation"), Party of the First Part; THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Philadelphia, Pennsylvania, a trust company duly organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, as Trustee (hereinafter referred to as "Trustee"), Party of the Second Part; and the owners from time to time of Certificates, in the forms hereinafter described or referred to, issued or to be issued by Foundation (hereinafter sometimes referred to as "Certificates"), who may become parties hereto by owning or acquiring Certificates (hereinafter referred to as "Holders"), Parties of the Third Part;

WITNESSETH, that

WHEREAS, Foundation is about to issue Certificates to the Holders in the form hereinafter more fully set out as Exhibits WH, WL, WB, WN, and WP, attached hereto, and/or such other forms as Foundation may from time to time adopt and the Trustee approve, to provide the Holders with a convenient means of a systematic and protected medium of saving and investment; and

WHEREAS, it is contemplated that the interests and property of the Holders under such Certificates shall be protected by a trust agreement in the form hereinafter contained; and

WHEREAS, Foundation is willing to be bound by the provisions of this trust agreement and the Certificates issued in connection therewith; and

WHEREAS, the Pennsylvania Company for Insurances on Lives and Granting Annuities is willing to act as Trustee of the trust herein created, subject, however, to the provisions hereof; and

WHEREAS, the Foundation has authority to execute and deliver this Trust Agreement and has duly authorized the execution and delivery hereof, and has authority to execute and deliver each of the Certificates referred to in and contemplated by this Trust Agreement;

NOW, THEREFORE, IN CONSIDERATION of the premises and the mutual covenants and agreements herein contained, the parties hereto intending to be legally bound by these presents, and in order to declare the terms and conditions upon which the trust hereinafter referred to is to be established and the money, trust shares and/or other property herein-after referred to, received, held, managed and applied for the benefit of the Holders, the parties hereto, each for himself, and itself, and not for the others or any of them, agree with each other as follows:

* * *
ARTICLE II
* * *

2.04. The Trustee shall keep at one of its offices in Philadelphia, Pennsylvania, certificate registry books, in which shall be kept a record of the Certificates outstanding and the names and addresses of the registered owners thereof.

Any Certificate issued hereunder may be assigned, anything in this Trust Agreement to the contrary notwithstanding, only upon the prior written consent of the Foundation and the Trustee, and upon presentation of the Certificate at the aforesaid office of the Trustee by the holder or his attorney duly authorized in writing, and upon payment to the Trustee of all reasonable transfer charges, taxes and unpaid deductions if any, and only if such assignment or

transfer is permitted under the Certificate. In case of an assignment by an attorney duly authorized in writing, the said attorney shall also present proof that the Holder of the Certificate is still alive. The assignee shall be substituted as the Holder of the Certificate and shall agree in writing to be bound by the terms of this Trust Agreement and by the Certificate and such assignment shall be noted by the Trustee upon the Certificate and the name and address of such assignee noted upon its registry books, whereupon such assignee shall become the registered owner of the Certificate and the Holder within the meaning of this Trust Agreement and the Foundation may issue and the Trustee certify a substituted Certificate to the assignee. No assignment of a Certificate carrying life insurance benefits shall be effective to transfer the insurance benefits unless the assignee has submitted evidence of insurability to the Insurance Company and unless he shall have been accepted by the Insurance Company, provided that such insurance benefits shall not be assignable if such assignee is more than fifty-five (55) years of age.

Anything above contained to the contrary notwithstanding, a Holder may assign his beneficial interest in the Trust Shares and his rights of withdrawal in respect thereto, without substituting the assignee as Holder, whereupon such assignee shall be entitled to exercise no rights under the Certificate other than the right of withdrawal and all other rights and all obligations under the Certificate shall continue to be those of the Holder. In the event that the Certificate carries life insurance benefits, such life insurance benefits shall continue or lapse as provided in the particular Certificate.

Nothing herein contained shall obligate the Foundation and/or the Trustee which shall have treated the registered owner as the legal owner of any Certificate for any purpose, including the issuance of a substitute Certificate and allowance of withdrawals, the exercise of options or payment of dividends thereunder or otherwise, to any assignee of which

said Trustee and/or Foundation shall not have had prior actual written notice.

ARTICLE III

Administration of the Trust

3.01. The initial payment (or the single payment in the case of a Fully Paid Certificate) under each Certificate will accompany the application therefor. No further payments shall be made under any Certificate with anyone not authorized by the Trustee in writing to receive the same. No payments shall be deemed to have been made until collected by the Trustee nor shall the Foundation be required to do anything under the Certificate because of a payment made otherwise than as specified by the Certificate until the same has been credited by the Trustee to the correct account and the Foundation notified thereof.

3.02. The Trustee is authorized to commingle all the cash received by it (including, without limiting the generality of the foregoing, periodic payments, cash dividends and distributions, the proceeds from the sale of dividends and distributions other than cash, the proceeds from the sale of proportionate interests in Trust Shares) with other cash held by it for other Trusts or for itself, and is authorized to deposit all such cash in such general or special bank accounts in its own banking department as may be most convenient, provided, however, that the Trustee shall at all times keep such books and records as will accurately show the allocation and application of all such cash.

3.03. All cash dividends and distributions upon the Trust Shares held by the Trustee will be divided pro rata among the Holders of Certificates in accordance with their respective beneficial interests in said Trust Shares, and after making authorized deductions, if any, will be distributed to or upon the order of the respective Holders.

Dividends and distributions received in form other than in cash, will be sold and the net proceeds thereof, after making authorized deductions, if any, similarly divided and distributed; provided that in the event that the Foundation shall notify the Trustee in writing that the interests of the Holders will be best served by the Trustee not selling such part of stock dividends as shall not be required to be sold in order to pay authorized deductions, if any, then and in that event such part of said stock dividends shall be retained as part of the trust, and the pro rata share of each Holder therein, credited to his account. The Trustee may in its sole discretion direct the Issuer of the Trust Shares to pay the pro rata share of such cash dividends and distribution upon Trust Shares directly to or upon the order of the Holder and may in such case direct such Issuer to deduct and pay over to it, as Trustee, authorized deductions, if any. The Holder shall have the option of paying, or causing to be paid, to the Trustee, for his account, any and all distributions made to him or upon his order, as above provided, for application by the Trustee for purchasing or otherwise acquiring additional Trust Shares. Anything above contained to the contrary notwithstanding, if the Holder shall have elected to pay over or caused to be paid over to the Trustee any or all of his said distributions, the Trustee may, when advised by the Foundation that it is to the best interests of the Holder, discontinue distributions to the Holder, or upon his order, and apply his pro rata share of all dividends and distributions upon the Trust Shares, less authorized deductions, if any, to the purchase or acquisition of additional Trust Shares; provided, however, that the Holder shall at all times and from time to time have the right to elect, in writing, to receive and retain his said pro rata share of dividends and distributions upon the Trust Shares.

3.04. Upon the receipt of the original or periodic payments and of payments representing reinvestment of in-

come or upon the retention by the Trustee of dividends and distributions on Trust Shares for reinvestment, the Trustee will first deduct therefrom the amounts it is authorized to deduct by the particular Certificate, or hereunder, and will pay over, retain and/or apply the amounts so deducted as authorized herein or in the Certificate. The Trustee will notify the Foundation or such other person or corporation as the Foundation shall in writing direct, upon each day upon which the New York Stock Exchange and/or other leading stock exchanges shall be open, of the amount of funds it has available for the purchase of Trust Shares and upon receipt from the Foundation and/or such person or corporation as the aforesaid notice shall designate, of the whole amount of Trust Shares or fraction of Trust Shares as the amount of money available will purchase at the market value thereof, will pay over to the person or corporation so furnishing Trust Shares the market value of such Trust Shares or fraction thereof.

The Trustee may from time to time adopt a time during each business day after which no periodic payments or payments of income will be reported to the Foundation during that day, and the funds, less deductions, received after the time so adopted shall be included in the report upon the next succeeding day upon which a report is to be given to the Foundation as above provided.

3.05. The Trustee is also authorized to commingle the stock certificates representing the Trust Shares held hereunder from time to time and shall in no case be required to hold separate Certificates for Trust Shares for the account of any one Holder. Each Holder shall have such beneficial interest in all the Trust Shares held by the Trustee hereunder as shall be represented by the number of Trust Shares and fractions thereof carried to the third decimal place, purchased by the Trustee with the net amount, after authorized deductions, of his periodic and other payments and investments of his pro rata share of income and

distributions. All such stock certificates for Trust Shares may be registered in the name of the Trustee individually or as Trustee under this Trust Agreement, or in the name of its nominee or nominees or otherwise as the convenience of the Trustee in its sole discretion may require.

* * *

3.07. The Trustee shall keep an account for each Holder showing the number of periodic payments made by him, any distributions paid over to, or retained by, the Trustee for the acquisition of additional Trust Shares, all deductions, the number of Trust Shares purchased with the net amount of all periodic payments and distributions paid over to, or retained by the Trustee, any beneficial interest in Trust Shares sold for his account, the number of Trust Shares withdrawn from the Trust and delivered to or upon the order of the Holder, and the number of Trust Shares which from time to time represent his beneficial interest in the Trust Shares held by the Trustee hereunder. Such account shall be the only account which the Trustee shall be required to keep regarding any particular Holder and such accounts shall at all times be open to inspection by the Foundation, and, as to his own account, upon proper identification, by the Holder.

3.08. Monthly audits of the Trustee's books of account and records relating to the Trustee's administration hereunder will be made for and at the expense of Foundation by a certified public accountant duly licensed by the Commonwealth of Pennsylvania, satisfactory to the Trustee, and the Foundation and Holders shall be entitled to examine the report of such audit at the Foundation's office at all reasonable times.

The Trustee may, if it deems it necessary, employ the services of such certified public accountants to aid it in the preparation of its tax returns and the cost of such certified public accountant furnished for this purpose shall be paid by the Foundation.

* * *

ARTICLE VI

Substitution of Trust Shares

6.01. Subject to the conditions hereinafter named, the Foundation may, at any time, at its option, substitute for Trust Shares named in any Certificate issued hereunder (either as to Trust Shares theretofore delivered to and held by Trustee or as to Trust Shares thereafter to be acquired under Certificates or both) Trust Shares or other divisible interests of any investment trust (incorporated or unincorporated) having securities in its portfolio of marketable and diversified character, such securities being reasonably comparable to those in the portfolio of Fund, or in case such Trust Shares are not available or the purchase of them is impracticable, such other Trust Shares or interests as in the opinion of Foundation will supply the Holders with Trust Shares of reasonable security and income producing characteristics, provided that in no case shall additions, deductions, or expenses be charged by reason of any such substitution.

No such substitution shall be made, however, unless:

1. The Foundation has, prior thereto, given to the Holders at least thirty (30) days' notice of its desire to deliver substituted Trust Shares to the Trustee in lieu of Trust Shares then held, and/or to cause the substituted Trust Shares to be delivered, in the future, to the Trustee as "Trust Shares." Such notice shall give Holders, registered as the owners of Certificates concerned, a reasonable description of the proposed substituted shares and shall further advise them that if they do not desire the Trustee to accept such substituted shares, they must, within thirty (30) days after the date of such notice, surrender their Certificate to the Trustee for withdrawal as provided in Certificate.

2. Foundation shall give notice of its intention to substitute as provided herein, to Trustee, and shall cer-

tify to Trustee that it has fully complied with the above provisions.

3. Trustee shall be satisfied that the market and liquidation value for such substituted shares may be reasonably ascertained in accordance with the provisions of Article I.

4. As to any substitutions for Trust Shares theretofore held, the substituted shares shall have an aggregate market value on the day of substitution at least equal to the liquidation value of Trust Shares to be withdrawn and Trustee satisfied of that fact.

6.02. After compliance by the Foundation with the foregoing conditions, it shall be the duty of all parties thereafter to recognize such substituted shares as Trust Shares for all purposes hereunder in respect to all Holders notified by the Foundation who have not notified the Trustee of their intention to withdraw prior to the date set forth for withdrawal, in which event such Holders shall be conclusively deemed to have authorized such substitution whether he has actually received notice or not.

6.03. Upon giving such notice, the Foundation shall furnish the Trustee with a copy thereof, together with the Certificate of the Foundation which shall be conclusive upon and full protection to the Trustee, setting forth the names of the Holders to whom the notices have been sent and whether the substitution is to affect Trust Shares then held by the Trustee, or Trust Shares thereafter to be acquired or both. After the expiration of the thirty (30) day period stated in such notice, the Trustee shall be fully authorized thenceforth to consider the substituted shares in every respect mentioned in this Trust Agreement and Certificates issued hereunder, as "Trust Shares," and in the event that the substitution shall include Trust Shares already purchased by the Trustee, the Trustee shall deliver to the

Foundation the Trust Shares theretofore held, upon receipt from the Foundation of substituted shares having on the day of substitution a market value equal to the liquidation value of Trust Shares for which substitution is made. The right of substitution herein given the Foundation may be exercised by it from time to time and whenever and as often as it deems it necessary.

All proper transfer taxes and transfer charges payable with respect to the transfer and delivery of said substituted shares shall be charged by the Trustee against the accounts of the respective Holders concerned. The Trustee shall hold the new Trust Shares received in exchange for the respective accounts of the Holder concerned in the same proportion as the old shares were held and shall make an appropriate entry showing the beneficial interest in the new Trust Shares so held upon the separate record kept by it for each of said Holders. The Trustee shall be entitled exclusively to rely upon the certificate of the Foundation setting forth the respective market and liquidation values of the old Trust Shares and the new Trust Shares.

6.04. In the event of the failure of the Foundation to furnish the Trustee with an adequate source from which the Trustee can purchase on demand at market value, sufficient Trust Shares, or substituted shares as permitted by Section 6.01 of this Article VI to invest all funds in the hands of the Trustee available for investment,—then in the event that the Foundation shall not, previously to the exercise, of such right, have given notice of its intention to substitute, the Trustee shall have the right, but shall not be obliged to do so, to select other Trust Shares, similar in every respect to those shares which may be substituted by the Foundation, to be purchased by it hereunder and under said Certificates, in which event the Trustee shall give written notice to Holders of its willingness to invest the periodic payments and investments of income thereafter received in such other substituted Trust Shares, pro-

vided the respective Holders shall give written approval to such substitution within thirty (30) days of said notice; in which event the Trustee shall thereafter invest the funds received by it in accordance with the terms of this agreement in such other Trust Shares; but if the Holder fails within such thirty (30) days' period to give his written approval to the substitution of such other Trust Shares, then such failure shall automatically and conclusively terminate his Certificate, with the same effect as though Holder had made written election to terminate the said Certificate under the terms thereof, and the Trustee will hold all uninvested funds without interest for payment to the respective Holders upon surrender of their respective Certificates for cancellation, and, at its option proceed as in the case of complete withdrawal, to sell to the Foundation beneficial interests in old Trust Shares in an amount sufficient to pay all authorized deductions and to cause Trust Shares equal to the balance of the Holder's proportionate interest in the old Trust Shares to be transferred to the name of the registered Holder and the stock certificate for such old Trust Shares shall remain in the custody of the Trustee until the Holder shall surrender his Certificate for cancellation.

ARTICLE VII

Resignation of the Trustee

7.01. The Trustee shall not have the right to disclaim or resign as Trustee in respect to any Certificate executed by it, provided that the Trustee shall have the right at any time to refuse to act as Trustee hereunder for any particular Certificate or Certificates not executed prior to such refusal, provided, however, that if the Trustee shall elect not to act as Trustee as to all Certificates to be issued after a given date, such refusal shall be effective only after written notice given to the Foundation six months prior to such effective date.

7.02. In case the Trustee becomes incapable of acting as Trustee hereunder, and/or its management and affairs be taken over by any governmental agency, then and in that event, the Foundation shall have the option, upon giving ten (10) days' written notice to the Trustee and to all Holders, to appoint a successor Trustee as to all Certificates, whenever issued, which substitution shall be effective upon expiration of such ten-day period, and the former Trustee shall, upon payment to it of all its proper expenses, charges and compensation and upon being indemnified to its satisfaction against any tax or other liabilities in connection with the Trust Agreement and the Certificates issued hereunder, transfer to the successor Trustee all Trust Shares and other property held by it as Trustee hereunder and shall furnish to the successor Trustee such information and data as it shall require to administer this trust and outstanding Certificates. Upon such transfer the successor Trustee shall become Trustee hereunder with the same force and effect as though it had executed this Trust Agreement initially as Trustee. Such successor Trustee shall be a bank or Trust Company organized under State or United States laws and having a capital and surplus of at least Two Million Dollars (\$2,000,000).

* * *

ARTICLE IX

Miscellaneous

9.01. Nothing herein contained shall be construed as to constitute Holders partners or members of an association.

* * *

In witness whereof, Wellington Foundation, Inc., has caused this Trust Agreement to be executed under the hand of its President and its corporate seal to be thereunto affixed, duly attested by its Secretary, and The Pennsylvania Company for Insurances on Lives and Granting

Annuities has also caused this Trust Agreement to be executed under the hand of one of its Vice Presidents and its corporate seal to be hereunto affixed, duly attested by its Secretary or one of its Assistant Secretaries as of July 15, 1935.

WELLINGTON FOUNDATION, INC.

(Corporate Seal)

by DAVID W. GUY,
President

Attest:

HORACE G. POWELL,
Secretary.

THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES

(Corporate Seal)

by FRANK G. SAYRE,
Vice-President

Attest:

L. J. CLARK,
Secretary.

EXHIBIT "W L".

No. WL

Plan WL

AA. First Maturity Date occurs after 120 monthly payments or the equivalent thereof have been made, or after the Trust Certificate has a Liquidation Value of \$....., whichever happens first. Ten Year Maximum Payment, \$.....

BB. Optional Maturity Date occurs after 60 additional monthly payments or the equivalent thereof have been made, or after the Trust Certificate has a Liquidation Value of \$....., whichever happens first. Payments in no event to exceed \$.....

WELLINGTON FOUNDATION, INC.

Incorporated Under the Laws of the State of Delaware

THIS AGREEMENT AND CERTIFICATE (hereinafter called "Certificate"), by and between WELLINGTON FOUNDATION, Inc. (hereinafter called the "Foundation"), and
....., Trust Creator (hereinafter called the "Holder");

WITNESSETH:

WHEREAS, the Foundation has entered into a trust agreement dated as of July 15, 1935 (hereinafter called "Trust Agreement"), with THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Philadelphia, Pennsylvania (hereinafter called the "Trustee"), and the Holders of certificates issued from time to time thereunder, providing inter alia for the issuance of certificates whereby Holders thereof may acquire a beneficial interest in certain Trust Shares to be held by the Trustee thereunder through payments made to the Trustee, and setting forth the terms, provisions and conditions under which said trust is accepted by the Trustee; and

WHEREAS, the Holder has signed an application, which the Foundation has accepted, for the issuance of a certificate in this form, and the Holder desires, by accepting and holding this Certificate, to become a party to the said Trust Agreement;

Now, THEREFORE, the Foundation and Holder have agreed as follows:

The Holder agrees to pay to the Trustee a sum not to exceed

..... Dollars, in a first payment of

..... Dollars, receipt whereof is hereby acknowledged, equivalent to

MONTHLY,

QUARTERLY,

SEMI-ANNUAL,

ANNUAL,

payments and the balance in not more than equal payments of

..... Dollars (\$.....) each, the first of such payments to be made on the

..... day of, 193..., and thereafter until:

(1) The total of all payments made by Holder aggregates the Ten Year Maximum Payment above stated; or

(2) The Foundation gives notice as hereinafter provided that the total liquidation value, as hereinafter defined, of the beneficial interest of the Holder in the Trust Shares held by the Trustee under the Trust Agreement less deductions provided for in Option 5 amounts to the Liquidation Value above stated under AA, and such fact declared as hereinafter provided;

whichever event shall occur first, which date is hereinafter referred to as the "Maturity."

Holder authorizes and directs the Trustee, upon receipt of such payments and after making the deductions authorized on the reverse side hereof, and after disbursing them as hereinafter directed, to use the residue of such payments for the purpose of acquiring by subscription or purchase at market value, as hereinafter defined, and holding under the terms and conditions of the Trust Agreement shares of capital stock of WELLINGTON FUND, INC., or such other shares as are hereinafter provided, the original, or duly substituted shares being hereafter called "Trust Shares."

All cash dividends and distributions upon the Trust Shares held by the Trustee will be divided pro rata among the Holders of Certificates in accordance with their respective beneficial interests in said Trust Shares, and after making authorized deductions, if any, will be distributed to or upon the order of the respective Holders. Dividends and distributions received in form other than in cash, will be sold and the net proceeds thereof, after making authorized deductions, if any, similarly divided and distributed; provided that in the event that the Foundation shall notify the Trustee in writing that the interests of the Holders will be best served by the Trustee not selling such part of stock dividends as shall not be required to be sold in order to pay authorized deductions, if any, then and in that event such part of said stock dividends shall be retained as part of the trust, and the pro rata share of each Holder therein, credited to his account. The Trustee may in its sole discretion direct the Issuer of the Trust Shares to pay the pro rata share of such cash dividends and distributions upon Trust Shares directly to or upon the order of the Holder and may in such case direct such Issuer to deduct and pay over to it, as Trustee, authorized deductions, if any. The Holder shall have the option of paying, or causing to be paid, to the Trustee, for his account, any and all distributions made to him or upon his order, as above provided, for application by the Trustee for purchasing or otherwise ac-

quiring additional Trust Shares. Anything above contained to the contrary notwithstanding, if the Holder shall have elected to pay over or caused to be paid over to the Trustee any or all of his said distributions, the Trustee may, when advised by the Foundation that it is to the best interests of the Holder, discontinue distributions to the Holder, or upon his order, and apply his pro rata share of all dividends and distributions upon the Trust Shares, less authorized deductions, if any, to the purchase or acquisition of additional Trust Shares; provided, however, that the Holder shall at all times and from time to time have the right to elect, in writing, to receive and retain his said share of dividends and distributions upon the Trust Shares, less authorized deductions, if any.

The Foundation agrees that it will secure an available source from which the Trustee can purchase at market value Trust Shares in the manner and under the terms and conditions hereinafter provided; and that it will purchase or secure a purchaser or purchasers for, at the liquidation value thereof, all Trust Shares tendered to it by or for the account of Holder, such purchase to be consummated within five days upon which the New York Stock Exchange and/or other leading stock exchanges shall be open, following the date of such tender.

Upon Maturity the Holder may, by written notice of his intention so to do, delivered to the Trustee, exercise options 2 or 3 in respect to the Trust Shares held for him hereunder. Until Holder or his duly authorized agent shall elect to exercise any of the aforesaid options, he shall be deemed to have taken Option 3.

When liquidation value, as defined upon the succeeding pages hereof, of the beneficial interest of the Holder in Trust Shares held by the Trustee under the Trust Agreement, equals the Liquidation Value as stated above under AA., plus deductions provided for in Option 5, Foundation agrees to give notice of such fact to the Holder and Trustee, and the Holder shall not be required to make further pay-

ments hereunder, unless he elects so to do under Option 2. After Maturity the insurance benefits will cease.

The Holder is entitled to all the privileges and his rights are subject in all respects to the terms and conditions specified on the following pages hereof and as specified in the Trust Agreement, to all of which reference is hereby made with the same force and effect as if all such privileges, terms and conditions were herein fully set forth on the face hereof.

IN WITNESS WHEREOF Foundation has caused this Certificate to be duly executed under the hand of its duly authorized President, and to be dated 193.....

WELLINGTON FOUNDATION, INC.

.....
President.

(Specimen)

TRUSTEE'S CERTIFICATE

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Philadelphia, Pennsylvania, does hereby certify that the foregoing Certificate has been issued by the Foundation subject to all the provisions, terms and conditions of the Trust Agreement and that the Holder has been registered upon its books as the owner hereof.

THE PENNSYLVANIA COMPANY
FOR INSURANCES ON LIVES
AND GRANTING ANNUITIES,
TRUSTEE

By

(Specimen)

WELLINGTON FOUNDATION, INC.

CORPORATE SEAL

1935

DELAWARE

TERMS, PROVISIONS AND CONDITIONS

The foregoing Certificate is issued subject to the following terms, provisions and conditions, which shall in all respects be construed as part thereof.

1. PAYMENTS: Payments shall be made promptly when due, to The Pennsylvania Company for Insurances on Lives and Granting Annuities, Philadelphia, Pennsylvania, as Trustee, at its office, 403 Commercial Trust Building, Philadelphia, Pennsylvania, or at such other address as the Trustee may from time to time in writing notify the Holder, and no payment shall at any time be made hereunder to anyone not authorized in writing by the Trustee to receive the same. The Holder shall not be entitled to notice of the due date of any payment.

2. DEDUCTIONS: The Holder hereby authorizes and directs the Trustee to deduct and pay over the following out of the payments made by the Holder, or, as the case may be, out of the dividends and distributions received upon the beneficial interest of the Holder in the Trust Shares held by the Trustee under the Trust Agreement:

(A) To the Trustee, to cover its services as Trustee hereunder:

1. While the Holder continues to make periodic payments hereunder a sum not in excess of 25¢ for each \$10.00 periodic payment or fraction thereof;
2. After the Holder has discontinued making periodic payments hereunder, then semi-annual or quarterly amounts at a rate per annum not in excess of 2/10 of 1% of the ten year maximum payment, such deductions to be made from and not to exceed the Holder's pro rata share of dividends and distributions.

(B) To Foundation for its services:

1. From the payments due for the first year (or such of them as Foundation may from time to time direct) a sum equal to \$72.00 per \$2,000.00 Liquidation Value, as stated under AA., on the face of this Certificate, such sum to be pro rated over the first ten months' payments (or periodic equivalent thereof);
2. In addition thereto, a sum equivalent to 5% of all payments made by the Holder (that is, each periodic payment, and any distributions paid over to or retained by the Trustee for the acquisition of additional Trust Shares) and any payment by the insurance company on the death of the Holder.

(C) The Holder hereby authorizes and directs the Trustee until Maturity to deduct from periodic payments made by the Holder such sums as the Foundation may from time to time advise the Trustee it is necessary to deduct in order to pay the proportion of insurance premiums attributable to the insurance on the life of the Holder. As of the date of issue of this Certificate the rate of insurance is \$1.10 per thousand dollars of insured balance per month.

(D) The Holder further authorizes and directs the Trustee to deduct from any payments made hereunder, from his pro rata share of dividends and distributions, or from the sale of any beneficial interest in the Trust Shares held by the Trustee, the amount or amounts, if any, which it may deem necessary to deduct or withhold for tax liability as herein defined in Section 11, and also authorizes and directs the Trustee, in case of default, partial withdrawal or complete withdrawal, or in any

other cases where Trust Shares may be distributed to the Holder, to deduct from the proceeds of the sale of any part of his beneficial interest in the Trust Shares held by the Trustee, such amount or amounts as it shall deem sufficient to pay all expenses of transfer and transmittal of Trust Shares to the Holder.

3. ADMINISTRATION OF TRUST: The Trustee is authorized to commingle any cash received by it hereunder with cash received from the Holders of other certificates and similarly to commingle all Trust Shares acquired for the trust. All Trust Shares held by the Trustee may be registered in the name of the Trustee hereunder individually or as Trustee in the Trust Agreement or in the name of its nominee or nominees, or otherwise, as the convenience of the Trustee may require. No particular Trust Shares shall be held for the Holder, but his interest in Trust Shares held by the Trustee as Trustee under the Trust Agreement shall be a beneficial interest in all Trust Shares so held represented by the number of Trust Shares purchased by the Trustee with the net amount of his payments, whether periodic payments or distributions paid over to or retained by the Trustee for the acquisition of additional Trust Shares.

The Trustee will keep an account for the Holder showing the number of periodic payments made by him; any distributions paid over to or retained by the Trustee for the acquisition of additional Trust Shares; all deductions; the number of Trust Shares purchased with the net amount of all periodic payments or distributions paid over to or retained by the Trustee; any part of the Holder's beneficial interest in Trust Shares sold by Trustee; the number of Trust Shares withdrawn from the trust and delivered to or upon the order of the Holder and the number of Trust Shares which from time to time represent his beneficial interest in all the Trust Shares held by the Trustee under the

Trust Agreement. Such account shall at all times be open to inspection by the Foundation and to the Holder, upon satisfactory identification.

In the event of the closing of the New York Stock Exchange and/or other leading stock exchanges, the Trustee may purchase Trust Shares or sell beneficial interests therein at such prices as the Foundation shall certify as fair or may, in its sole discretion, defer purchase and sale until such exchange or exchanges open. The Trustee shall at all times be entitled to rely conclusively on the market values and liquidation values quoted to it by the Foundation and is hereby authorized and directed by the Holder to purchase and sell at such prices.

4. INSURANCE: The Foundation has arranged for life insurance under a group and/or blanket life insurance policy, or policies, on the life of the Holder provided he or she be in good health and acceptable at the time of the execution of this agreement. Said policy or policies provide that subject to the limitations, terms, conditions and privileges set forth therein, and upon receipt of due proof of death of the Holder occurring while said policy is in force and while the Holder is insured thereunder, the insurance company issuing said policy will pay to the Trustee as agent of the Foundation an amount equal to the difference between the ten year maximum payment and the amount which the Holder has paid hereunder, other than the distributions paid over to or retained by the Trustee for the acquisition of additional Trust Shares. Upon Maturity, insurance benefits shall cease. Said policy or policies also provide that the benefits thereunder will not be available to the Trustee, as agent, if (a) the Holder shall die when he shall have been in default for more than sixty (60) days in respect to any payment hereunder, or (b) the Holder shall commit suicide, while sane or insane, within two years from the date thereof, or (c) the application misrepresents or falsely states any facts material to the risk.

Nothing contained in this Certificate shall be deemed to be a representation or promise on the part of the said insurance company or as placing the said insurance company under any accountability or responsibility whatsoever to the Holder, but its entire responsibility shall be exclusively to the Trustee, as agent of the Foundation, and is to be determined wholly in accordance with the terms and conditions of such group and/or blanket life insurance policy as may at the time be outstanding in the name of the Trustee, as agent of the Foundation.

Upon receipt of legal proof of death, on forms prescribed by the Foundation and upon payment by the insurance company to the Trustee of the money due under such policy, the Foundation will secure a source from which the Trustee shall purchase, at market value, Trust Shares in an amount equal to the aforesaid payment by the insurance company less the deductions herein authorized to be deducted and paid; provided, however, that, if the insurance company shall fail or refuse to pay the amount claimed under said policy, the Foundation and/or the Trustee shall not be required to bring suit against said insurance company, or incur any expenses for collecting on said insurance policy or policies unless they or either of them are reasonably indemnified against costs, counsel fees and other expenses by or on behalf of those claiming under this Certificate.

In the event that the Foundation is prevented, as provided in Section 4.06 of the Trust Agreement, from maintaining its policy or policies of insurance it will give notice thereof to the Holder that the insurance provided for by this Certificate has ceased, whereupon the Foundation shall be relieved of its obligation to maintain said insurance and the Holder agrees to surrender his Certificate forthwith to the Trustee for such fact to be appropriately noted hereon.

5. DEFAULT: A Holder shall be deemed to be in default whenever he shall have failed to make any payment pro-

vided for hereunder on or before the date when due. In case any Holder shall have been in default for a period of more than sixty days, the benefits of the insurance referred to herein will automatically terminate. At any time thereafter and prior to the termination hereof by the Trustee as hereinafter provided, the Holder may resume payments hereunder, without insurance benefits, and no further deductions will be made on account of such insurance (unless the same shall be reinstated). If the Holder desires to reinstate the benefits of insurance within one year of the date of default he may do so upon application to and approval by the Foundation and the Trustee and upon proof of insurability satisfactory to the insurance company, in which event this Certificate will be, if necessary, redated, and the authorized deductions for cost of the insurance will again be made, provided that under no circumstances will the new date be more than one year later than the original date of this Certificate. In the event the Holder does not resume payments within the period of one year after default, either with or without insurance, the Trustee may at its option and shall at the direction of the Foundation exercise Option 5 on the behalf of the Holder and shall notify the Holder that he may secure the Trust Shares to which he may be entitled upon the exercise of Option 5 upon the surrender of this Certificate, upon which notice, the Trustee shall no longer be under any liabilities hereunder or under the Trust Agreement.

6. OPTIONS:

1. The Holder may accelerate the maturity of this Certificate by making payments to the Trustee in advance, provided that such payments shall be in multiples of the periodic payment.

2. At any time after Maturity, the Holder may, upon giving written notice of that fact to the Trustee, continue to make sixty (60) additional monthly payments without insurance benefits (or the periodic

equivalent thereof), in which event the Trustee is authorized and directed upon receipt of such payments and after making authorized deductions to use the residue of such payments for the purpose of acquiring Trust Shares by subscription or purchase at market value but the Holder may at any time thereafter discontinue periodic payments in which event he will be presumed to have exercised Option 3. In the event the total liquidation value of the Holder's beneficial interest in the Trust Shares held by the Trustee under the Trust Agreement less the deductions provided for in Option 5 amounts to the Liquidation Value stated under BB. on the face hereof, the Foundation agrees to give notice of such fact to the Holder and the Trustee, whereupon further periodic payments shall cease, which latter event shall be herein referred to as the "Optional Maturity." In the event that a Holder has elected to exercise Option 2, the Foundation shall no longer be under any duty to give notice that the Liquidation Value has been reached and the fact that the Holder's beneficial interest in Trust Shares shall thereafter equal the Liquidation Value shall not have any effect upon this Certificate.

3. At any time, at a Maturity or an Optional Maturity, as herein defined, the Holder may allow the Trustee to continue to hold his beneficial interest in the Trust Shares, in which event his pro rata share of dividends and distributions shall be administered by the Trustee as theretofore, subject to the options with respect thereto, stated upon the face of this Certificate. The Holder will be presumed to have exercised this option, but may at any time thereafter exercise any other applicable option.

4. At any time after making twelve (12) monthly payments (or the periodic equivalent thereof) the Holder, without cancelling this Certificate, may from

time to time deliver the same to the Trustee with a written notice that he desires to withdraw the number of whole Trust Shares which shall not exceed 80% of his beneficial interest in the Trust Shares held by the Trustee) specified in such notice. Upon receipt of such notice the Trustee shall first sell to the Foundation at the liquidation value, and charge against the Holder's account, such part of his beneficial interest in the Trust Shares as shall be necessary to pay all authorized deductions, shall withdraw from the Trust the number of Trust Shares specified by the Holder, shall cause the said Trust Shares to be transferred to his name and shall, unless the Holder shall direct otherwise, mail such Trust Shares to him at his address registered upon the books and return the Certificate to him with notice of the withdrawal noted thereon. The Holder shall have the right at any time prior to the exercise of Option 5, upon delivery hereof to the Trustee, to pay to the Trustee an amount or amounts not exceeding the liquidation value at the time of withdrawal of the Trust Shares withdrawn; whereupon the Trustee shall, after making the deductions for Trustee's compensation above authorized in the case of periodic payments, apply the balance to the purchase of Trust Shares similarly to the case of periodic payments hereunder, and shall return this Certificate to the Holder with such payment noted thereon.

5. The Holder may at any time before or after Maturity, surrender this Certificate to the Trustee for complete withdrawal and cancellation, whereupon all liability for future periodic payments shall cease. In such case the Trustee shall sell to the Foundation at the liquidation value thereof such part of the Holder's beneficial interest in the Trust Shares as shall be necessary to pay all deductions, including those that might be payable out of future payments under paragraphs

B1, C and D of Section 2, and to leave no fractional Trust Shares credited to the Holder's account. The Trustee shall thereupon withdraw any remaining whole Trust Shares from the Trust, and shall cause said Trust Shares to be transferred to the name of the Holder, and shall, unless the Holder shall direct otherwise, mail the same together with the residue of the proceeds of the sale to the Foundation, to the Holder at his address registered upon its books, whereupon the Trustee shall be released of all liability and responsibility to the Holder hereunder or under the Trust Agreement.

7. TRUSTEE'S OPTION TO TERMINATE AFTER 25 YEARS:

At any time after 25 years after the date of this Certificate the Trustee shall have the option, upon giving thirty (30) days' written notice to the Holder, of exercising Option 5 on his behalf, whereupon the Trustee shall no longer be under any liability hereunder or under the Trust Agreement, and the Holder may secure the Trust Shares to which he may be entitled upon the exercise of Option 5 upon the surrender of this Certificate.

8. ASSIGNMENTS: This Certificate, except as to insurance, may be assigned, subject to the provisions of the Trust Agreement, only upon the prior written consent of the Foundation and the Trustee and the assignee agreeing in writing to be bound by the terms of this Certificate and of the Trust Agreement, and upon presentation hereof at the office of the Trustee mentioned in Section 1 by the Holder or his attorney duly authorized in writing and upon the payment of all reasonable transfer charges, taxes and unpaid deductions, if any. In the case of an assignment by an attorney duly authorized in writing, the said attorney shall also present proof that the Holder is still alive.

Until written request for transfer has been received by the Foundation and the Trustee, or until an assignee has tendered this certificate with the request that the Trust

Shares held hereunder be distributed by way of withdrawal, the registered Holder shall be conclusively deemed to be the absolute owner.

After a transfer of the Holder's beneficial interest in Trust Shares and all rights of withdrawal in respect thereto, the benefits of insurance above described will terminate as to the Holder, but the benefits may, within thirty (30) days of the date of such assignment be extended to the transferee and reinstated as to the original Holder with the consent of the Foundation. In the event that the obligations as well as the benefits of this Certificate are assigned, the insurance shall be extended to cover the life of the assignee, provided such assignee shall not be more than 55 years of age, upon written application therefor, and his acceptance by the insurance company, after proof of insurability, satisfactory to it. In the event that the assignee shall be more than 55 years of age, and/or shall fail to make the aforesaid application, and/or shall not prove to be acceptable to the life insurance company, such assignment shall be effective but the Certificate shall not thereafter carry insurance benefits.

9. VOTING RIGHTS: Subject to such reasonable regulations as the Trustee may establish, the Holder may, by giving four days' written notice to the Trustee, secure a proxy or proxies entitling him or his nominee to vote at any meeting of the Stockholders of the issuer of Trust Shares to be held within the ensuing three months, the number of whole Trust Shares as shall at the time be equal to the beneficial interest of the Holder in the Trust Shares held by the Trustee. The Trustee shall not be under any duty to advise the Holder of any meeting at which such Trust Shares may be voted, but Foundation agrees that it will, if so requested by the Holder in writing, cause the Holder to be advised by mail in respect to any meetings in regard to which he may be entitled to a proxy, at least eight days before any such meeting. The Trust Agreement provides that proxies shall be given to the Foundation or to its

nominee or nominees for any Trust Shares on which proxies have not been requested by the Holders as aforesaid.

10. SUBSTITUTION OF TRUST SHARES: The Trust Agreement contains detailed provisions regarding the right of Foundation to substitute other trust shares for Trust Shares held at any time under this Certificate and also with respect to Trust Shares to be thereafter acquired hereunder. Such right exists, however, only after thirty (30) days' written notice has been given the Holder, upon which notice the Holder may exercise Option 5, or in the event of approval of the proposed substitution or the failure to indicate disapproval (in which event the Holder shall be conclusively deemed to have authorized the substitution), the Certificate shall continue in force for the balance of its term and in all respects, subject to the same circumstances and conditions as prior to substitution, except for the identity and character of Trust Shares.

The Trustee may also substitute Trust Shares after thirty (30) days' written notice to the Holder, if the Trust Shares then purchasable are not available for purchase and the Foundation does not provide substituted Trust Shares, but in that case, unless the Holder delivers a written consent to the Trustee, he will be required to exercise Option 5.

11. TAXES: In no event shall the Trustee be personally liable for any taxes which may be levied, assessed or charged against it as Trustee for the Holder or as Trustee under the Trust Agreement, or against it in any wise in respect to any Trust Shares or other property, or the income therefrom held or received by it as Trustee for the Holder, or as Trustee under the Trust Agreement. The Trustee may in its discretion pay any or all such taxes and shall be reimbursed and indemnified out of the Holder's beneficial interest in the Trust Shares held by it and/or out of the income therefrom and/or out of the payments made from time to time by the Holder or for the Holder.

For any expenses, including auditors' and counsel fees, which may be expended or incurred with respect to any claim, action or suit relating to such taxes, the Trustee shall in the same manner be reimbursed and indemnified, and the Trustee is fully authorized to sell to the Foundation, at the liquidation value, such part of the Holder's beneficial interest in the Trust Shares as may be necessary to pay any such taxes or any such expenses, including auditors' and counsel fees. Whenever in the opinion of the Trustee it is proper or expedient to make deductions or withhold funds, Trust Shares or other property held by it under the Trust Agreement to cover any tax liability, it is authorized so to do, it being understood that when the exact amount of such tax liability is finally determined, proper credit will be given to the Holder's account. Wherever used in this Certificate, the words "tax liability" shall be construed to embrace not only taxes levied, assessed or charged, but also any expenses including auditor's and counsel fees expended or incurred with respect thereto and any possible tax liability and any expenses, including auditors' and counsel fees, which may be expended or incurred with respect thereto for which Trustee deems it proper or expedient to make provision. The words "tax" and "taxes" as used in the Certificate shall be construed to embrace any taxes, including issuance and transfer taxes levied, charged, imposed or assessed under any present or future law or laws of the United States of America or of any other taxing authority.

12. INFORMATION: The Holder may at any reasonable time or times, upon satisfactory identification, receive, without charge, from the Trustee a written statement showing the number of Trust Shares which represents his beneficial interest in all Trust Shares held by the Trustee. The Foundation will from time to time furnish to the Holder, statements with respect to the amount and nature of dividends and/or distributions and/or other income received for the benefit of the Holder.

13. **DEFINITIONS:** "Liquidation Value," as herein used, shall be the appraised value of the Trust Shares or beneficial interest therein in respect to which liquidation value is being computed, less all costs proportionately applicable to such Trust Shares or beneficial interests therein, such as a reasonable approximation of broker's commissions, taxes and stock transfer fees which would be incurred in the sale of the assets of the issuer of Trust Shares; such "appraised value" to be as of the close of business of the day on which the New York Stock Exchange and/or other leading Stock Exchanges shall be opened next succeeding the day as of which liquidation value is being computed.

Due to the fact that during the normal administration of the Trust, there should be a steady demand from the Trustee for Trust Shares at market value, the Foundation will, whenever possible, secure a purchaser or purchasers for Trust Shares tendered as provided on the face of this Certificate at the market value thereof.

"Market Value" as used in this Certificate shall be the "appraised value" of Trust Shares in respect to which market value is being computed, plus all costs proportionately applicable to such Trust Shares, such as a reasonable approximation of brokers' commissions which would be incurred in the purchase of the assets of the issuer of Trust Shares; such "appraised value" to be as of the day and time of day in respect to which market value is being computed.

Market value as above defined does not contain or include the brokerage commission that would be charged if Trust Shares would be bought on the open market. The only difference between "market value" and "liquidation value" is the difference which would be experienced by a holder of any marketable security in selling such security when the quoted price is the same as it was when the security was purchased.

As used in this Certificate "Appraised Value" of Trust Shares at any particular time shall be the quotient

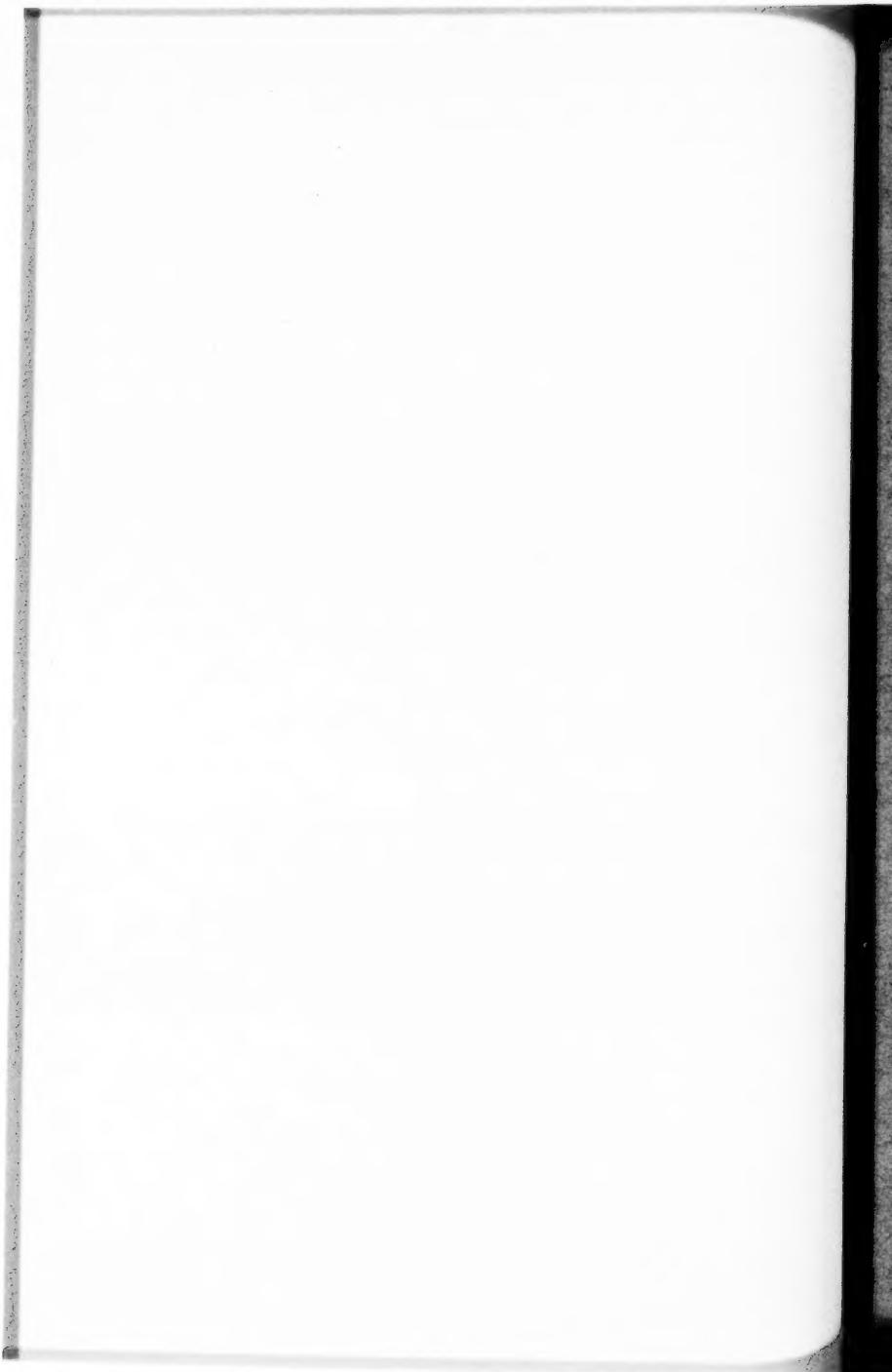
obtained by dividing the appraised value of the assets of the issuer of Trust Shares (hereinafter referred to as Issuer) less any liabilities and accruals as determined in the discretion of the Board of Directors of such issuer, by the total number of Trust Shares outstanding (including shares sold, but not physically issued). In determining appraised value, listed securities will be valued at their closing daily published sale price unless such closing price shall not be deemed by the issuer to be their reasonable or fair value when measured in comparison with the bid and ask quotations, in which event such securities shall be appraised in the same manner as unlisted securities. In determining appraised value of securities or other assets which are not listed or which have not been traded in on the particular day, the directors of the issuer shall place a reasonable value (not to exceed the quoted "ask" price, if any, or to be less than the quoted "bid" price, if any, of the particular security); and in placing such reasonable value upon a security, the Issuer's directors shall make enforceable the policy of the Issuer to admit new stockholders only under such conditions as they will be on terms of equality with existing Trust Shareholders, and that withdrawing Trust Shareholders shall receive only their fair pro rata share of the cash value of the Issuer's Assets.

14. DUTIES AND OBLIGATIONS OF THE TRUSTEE: The Holder, by accepting this Certificate, hereby agrees that the obligations and duties of the Trustee hereunder are also subject to all the terms, provisions and conditions respecting the Trustee, set forth in the Trust Agreement, and that the Trustee's responsibility and liability are also limited as therein provided.

15. MISCELLANEOUS: No agent or other person has authority to alter or change the terms of this Certificate, or to bind the Foundation, Trustee or the issuer of Trust Shares by any statement, written or oral, not contained herein.

Any notice herein required or permitted to be given by the Foundation and/or the Trustee to the Holder shall be conclusively deemed to have been given when such notice is enclosed in an envelope addressed to the Holder at his, her or its address as registered on the books of the Foundation or Trustee and deposited in the United States mail, postage prepaid, and the date of mailing said notice shall be deemed the date of giving such notice.

Copies of the Trust Agreement, to all the terms, provisions and conditions of which the Holder consents by accepting and holding this Certificate, will remain on file at the principal office of the Foundation, also at Philadelphia. The Trust Agreement may be amended or modified by the Foundation and the Trustee without the consent of the Holder, provided that no such amendment or modification shall substantially impair or adversely affect the rights of the Holder.



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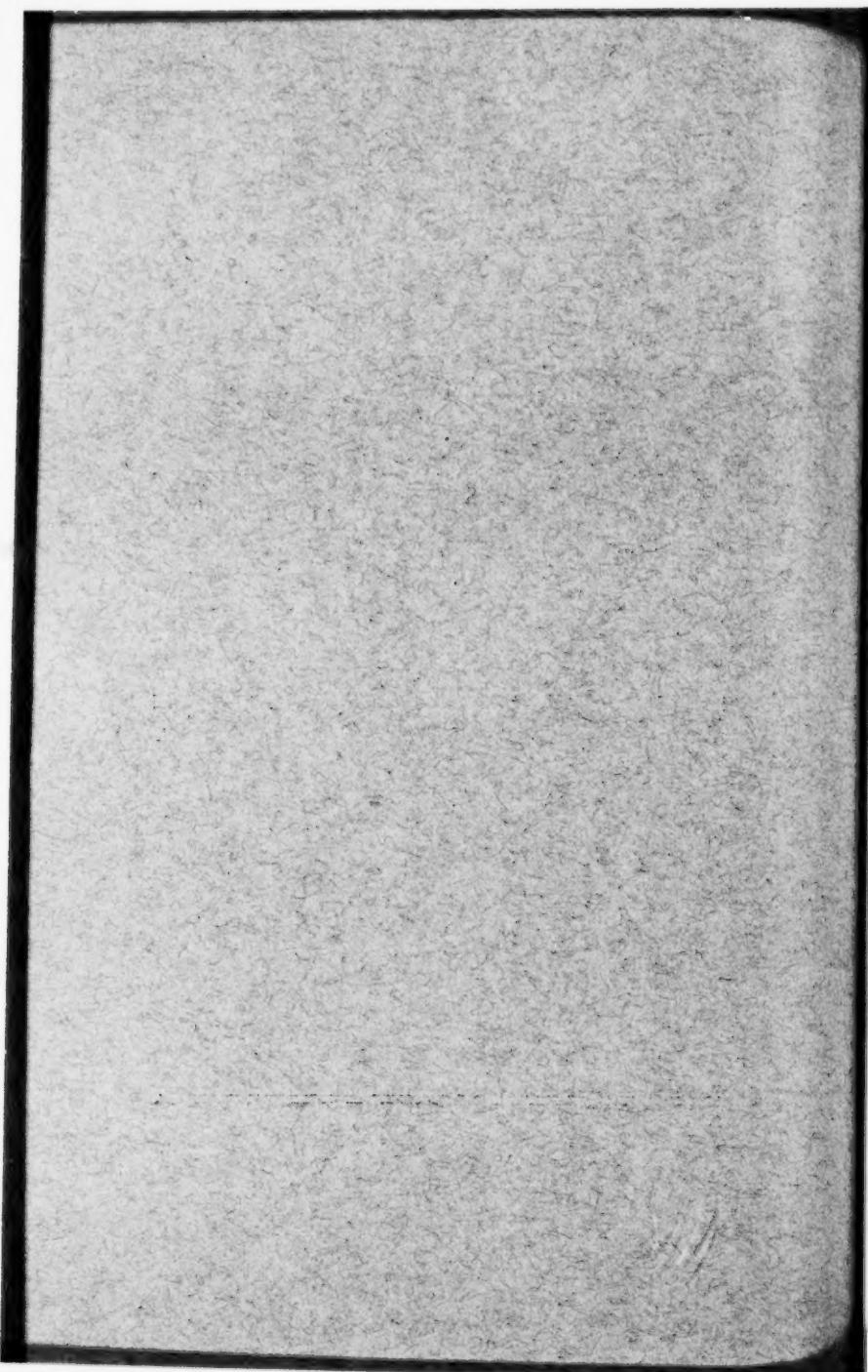
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 691

**THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES, ETC.,
PETITIONER**

v.

THE UNITED STATES OF AMERICA

No. 692

**THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES, ETC.,
PETITIONER**

v.

THE UNITED STATES OF AMERICA

**ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 65-75) is reported in 138 F. 2d 869, and the opinions of the District

(1)

Court of the United States for the Eastern District of Pennsylvania (R. 30a-34a, 61a) are reported in 48 F. Supp. 969, 972.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on November 16, 1943 (R. 75, 76). The petition for writs of certiorari was filed February 11, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain trusts, of which petitioner was trustee under each of two trust agreements, one entered into by it with Capital Savings Plan, Inc., and one with Wellington Foundation, Inc., were associations in the taxable years in question, within the provisions of Section 1001 of the Revenue Act of 1936, Section 901 of the Revenue Act of 1938 and Section 3797 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra*, pp. 17-23.

STATEMENT

Petitioner, the Pennsylvania Company for Insurances on Lives and Granting Annuities, called the trustee, entered into separate trust agreements with Capital Savings Plan, Inc., and Wellington

Foundation, Inc., commonly referred to as the sponsor¹ or as the distributor,² and sometimes as the depositor³ (R. 2a, 38a; Pet. 41-86, 87-119). The so-called trust declared by each agreement

¹ See Report of the Securities and Exchange Commission, made pursuant to Section 30 of the Public Utilities Holding Company Act of 1935, regarding Investment Trusts and Investment Companies, pamphlet entitled "Fixed and Semifixed Investment Trusts," p. 11, also particularly pamphlet "Companies Sponsoring Installment Investment Plans," pp. 4, 16-17, 107-111. The following is a complete list of the various pamphlets of which this report is composed:

Investment Trusts and Investment Companies, Part One, The Nature, Classification, and Origins of Investment Trusts and Investment Companies (also published as H. Doc. No. 707, 75th Cong., 3d Sess., serial No. 10,262); Part Two, Statistical Survey of Investment Trusts and Investment Companies; Part Three, Chapters 1 and 2, Abuses and Deficiencies in Organization and Operation of Investment Trusts and Investment Companies; Part 3, Chapters 3, 4, and 5, same title; Part 3, Chapter 6, same title; Part 3, Chapter 7, same title; Parts Four and Five—Part 4, Control and Influence Over Industry and Economic Significance of Investment Companies; Part 5, Conclusions and Recommendations.

Investment Trusts and Investment Companies, Investment Trusts in Great Britain.

Investment Trusts and Investment Companies, Fixed and Semifixed Investment Trusts.

Investment Trusts and Investment Companies, Commingled or Common Trust Funds Accumulated by Banks and Trust Companies.

Investment Trusts and Investment Companies, Companies Sponsoring Installment Investment Plans.

² Same report, pamphlet entitled "Companies Sponsoring Installment Investment Plans," pp. 16-17.

³ *Commissioner v. Chase Nat. Bank*, 122 F. 2d 540 (C. C. A. 2d); *Commissioner v. North American B. Trust*, 122 F. 2d 545 (C. C. A. 2d).

was what investment brokers commonly call an investment trust of the "semifixed" type. By this is meant an investment trust whose management, consisting of the sponsor and trustee acting in combination, has the power, though limited, to vary the investment underlying the so-called trust shares represented by trust share certificates (R. 34a, 61a), which the trustee issued and which the sponsor sold to the public generally.⁴ As of October 1, 1940, Capital Savings Plan, Inc., had 593 contracts outstanding (R. 8a). During the calendar year 1937 the trustee sold trust shares to 258 investors (R. 9a-10a). Under the Wellington Foundation, Inc., trust agreement 7,110 certificates were issued. As of May 1, 1941, there were 5,300 certificates outstanding.⁵ (R. 44a.)

In the case involving the Pennsylvania Company's agreement with Capital Savings Plan, Inc., the trust shares consisted of shares of stock

⁴ For a full discussion of the difference between fixed and semifixed investment trusts, on the one hand, and management investment trusts, on the other, see the separate pamphlet of the same report entitled "Fixed and Semifixed Investment Trusts," generally, and particularly pp. 1-9.

⁵ Notoriously, the sales were to a large extent made by house-to-house canvassing, as that was the only way the plans could be sold. See Report of the Securities and Exchange Commission, pamphlet entitled "Companies Sponsoring Installment Investment Plans," pp. 13, 18, 143-144. Thus, Capital Savings Plan, Inc., was primarily a sales organization. *Ibid.*, p. 144.

of Independence Shares Corporation, another Pennsylvania investment company, until December 31, 1938, when Capital Savings Plan, Inc., and Independence Shares Corporation merged. Since that time, Independence Shares Corporation has sold those shares. (R. 2a-3a.) In the case involving the Pennsylvania Company's agreement with Wellington Foundation, Inc., the trust shares at all times consisted of the shares of stock of Wellington Fund, Inc., another Pennsylvania investment trust company⁶ (R. 38a-39a). These trust shares were purchased by the trustee as funds became available (R. 6a, 43a). They were evidenced by Trust Share Certificates which were from time to time issued to the investor by the sponsor upon the investor's written application

⁶ The trust shares of other sponsor corporations represent interests in shares called trust share units of corporate stocks and bonds created by the sponsor. Units of this type were involved in *Commissioner v. Chase Nat. Bank*, 122 F. 2d 540 (C. C. A. 2d), and *Commissioner v. North American B. Trust*, 122 F. 2d 545 (C. C. A. 2d), as also in two other cases decided by the District Court of the United States for the Eastern District of Pennsylvania against the United States, which are now pending on appeal by the United States in the United States Circuit Court of Appeals for the Third Circuit, one involving an agreement between the Pennsylvania Company and Independence Shares Corporation, with which Capital Savings Plan, Inc., was merged as aforesaid, and the other an agreement between the Pennsylvania Company and Bank and Insurance Shares, another Pennsylvania investment trust corporation.

therefor accompanied by an initial payment, the name of the investor being then entered in the trustee's registry book kept for that purpose (R. 4a, 39a-40a). The certificates were of several types. One type was sold on the installment plan; another of the same type had added insurance benefits, and the third was a fully paid up certificate (R. 3a, 39a). The deposited securities were held by the trustee in what in effect was a revolving fund, and each certificate (to the extent that it was paid for in full) represented an equal *pro rata* share thereof or interest therein (Pet. 45-49, 69-71, 90-93). The certificates were transferable on the books of the trustee kept for that purpose pursuant, however, to a somewhat stricter ritual than is generally observed in connection with the transfer of corporate stocks (Pet. 84-85, 89). Dividends received by the sponsor upon the deposited stock were paid by it to the trustee and were carried by it in a cash account, in which were also deposited proceeds from the sale of eliminated securities, as well as other cash received (R. 8a, 45a). An investor in a trust share certificate had the option of having his certificate redeemed by the payment to him out of the cash funds of the trust of the value of the shares in the deposited security represented by the certificate he held, or to receive the number of shares of such securities which the trust shares he owned represented, plus cash accumulations in the

trustee's hands which were allocable thereto⁷ (R. 5a-6a, 42a). In the event an investor elected to have his certificate redeemed in cash, the underlying shares of stock were sold (R. 7a, 42a-43a). A surrendered certificate was marked "Liquidated" (R. 6a, 43a). Distributions on trust shares were remitted to the investors in additional trust shares (R. 5a, 41a-42a). The trustee kept a separate account with each certificate holder, in which his *pro rata* interest in the deposited securities, carried out to the third decimal place, was entered (R. 6a, 42a). All work in connection with the trust's activities was performed by the employees of the Pennsylvania Company, which used its own stationery (R. 8a, 44a-45a). The investors had no voting rights. The trust agreement did not provide for meetings of the investors and none was held. The trust had no directors, officers, or employees; nor had it any stationery, seal or minute book. (R. 9a, 46a.) The trust agreement contained elaborate provisions limiting the liability of the trustee (Pet. 51-54). See also

⁷ The right of the certificate holder thus to have his trust shares redeemed characterizes the organization as an "open-end" investment trust, as distinguished from a "closed-end" investment trust, which does not have the redemption feature. See Report of the Securities and Exchange Commission, pamphlet entitled "Part One, The Nature, Classification, and Origins of Investment Trusts and Investment Companies," pp. 1-2, 27-28. See also reference thereto in the same report, pamphlet entitled "Companies Sponsoring Installment Investment Plans," p. 4.

Article V (p. 16) of the Wellington Foundation Trust Agreement (R. 47a). Capital Savings Plan, Inc., was ultimately merged with Independence Trust Shares Corporation, whose stock was deposited by Capital Savings Plan, Inc., with the trustee and represented the underlying security for the trust shares that corporation had sold under its agreement aforesaid with the Pennsylvania Company (R. 3a). Each trust was terminable in any event on a given date (Pet. 58-61, 113).

Both the sponsor and the trustee received certain fixed fees for the services each performed payable out of the funds of the trust (Pet. 45, 77-78, 81-84). See also Article V, Section 5.03 (p. 19) of the Wellington Foundation, Inc., agreement (R. 47a).

Each trust agreement contained provisions with similar import, regarding the sponsor's right to vary the investment. Thus, each sponsor was under limited circumstances and upon notice to the trustee permitted to substitute shares of stock of another investment corporation owning reasonably comparable securities, or, alternatively, certain bank and trust company obligations approved by the trustee and representing trust shares of a similar nature (Pet. 56-57, 94-97).

The District Court concluded that the trust in each of the cases, was an association taxable as a corporation (R. 34a, 61a) and accordingly en-

tered a judgment in each case in favor of the United States (R. 35a, 62a). The basis of its decision was that in each case the trustee had the power to vary the investment which was not confined to the same stock which had been selected for the first unit (R. 30a-34a, 61a). Accordingly, the District Court held that the trust agreements in the cases at bar fell within the principles announced by the Circuit Court of Appeals for the Second Circuit in the case of *Commissioner v. North American B. Trust*, 122 F. 2d 545 (R. 34a).

The court below affirmed the judgments of the District Court, holding that both trusts were business trusts whose set-up in every substantial particular met the *quasi* corporate form test laid down by this Court in the case of *Morrissey v. Commissioner*, 296 U. S. 344 (R. 65-75). In describing the nature of the business in which each was engaged, the court below said that the facts justified the conclusions that the trust device was adopted here and had been used to facilitate the distributors' sales of their trust shares among many small investors whose net aggregate contributions were utilized by the trustee from day to day for that purpose and that the participation of the beneficiaries as investors in trust shares, through the medium of the trustee, was for the hope of return by way of dividends and of gain through the possible enhancement in the value of the trust

shares, concluding that their participation could hardly be said to be for the achievement of the security and preservation of property which is ordinarily the purpose of a trust (R. 74). The court further stated that the trusts fell within the principle of the *North American B. Trust* case, since here, as there, the trustee had the qualified power to vary the investment by substituting different corporate securities from those originally deposited.

ARGUMENT

1. Petitioner does not contend that the decision of the court below is in conflict with a decision of any Circuit Court of Appeals, but asserts a conflict with the decision of this Court in *Morrissey v. Commissioner*, 296 U. S. 344. The principles established by the *Morrissey* case are, of course, controlling here, but as that case involved a real estate trust which was held to be an association, the decisions below cannot be in direct conflict with that decision. Essentially petitioner's argument is merely that the trusts here do not meet either the business test or the corporate form test laid down by this Court in the *Morrissey* case. But, even if this were so, it would not establish a conflict which would justify a review by this Court.

2. In deciding this case the court below correctly applied the business test as defined in the *Morrissey* case. In that case, this Court distin-

guished between business trusts, the object of which was to provide a medium for the conduct of a business and the sharing of its gains, and a trust whose object is to hold and conserve particular property with incidental powers as in the traditional type of trust. It included within the former category trusts created as a convenient means by which persons become associated for dealings in real estate, the development of tracts of land, the construction of improvements, the purchase, management and sale of properties, or dealings in securities or other personal property, where those who become beneficially interested either by joining in the plan at the outset or by later participation according to the terms of the arrangement seek to share the advantages of a union of their interests in a common enterprise (296 U. S. 344, 357). In the case at bar the purpose of all the parties was profit, not the conservation of properties, so the holding of the court below that this trust was a business trust is precisely in accord with the rules laid down in the *Morrissey* case. Moreover, the decision follows the regulations, which specifically provide that all investment trusts are to be regarded as associations. Art. 1001-2 of Regulations 94, Appendix, *infra*, pp. 18-19.

Petitioner's contention that the decision below does not conform to the business test is based chiefly on the ground (Br. 26-29) that limita-

tions upon the power of the sponsor corporations acting in conjunction with the trustee to vary the investments of the trusts prevented their activities from being classified as business activities. In so arguing, petitioner relies primarily on the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Chase Nat. Bank*, 122 F. 2d 540 (Br. 26-29). But neither that decision nor the decision of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner v. Buckley*, 128 F. 2d 124, which followed the *Chase Nat. Bank* case as applied to a substantially identical trust, held that a semifixed investment trust, such as the one here involved, would not be considered as having the business activities necessary to constitute an association. In the *Chase Nat. Bank* case, each unit was to be composed of sixteen shares of stock of thirty specified companies. Shares could be eliminated from the portfolio only under exceptional circumstances and, when the number of corporations represented fell below sixteen, the agreement was to be terminated. There was no power to substitute shares of other corporations. In the cases at bar there was a power of substitution of shares of other investment trusts comprising the original portfolio, although the power was qualified. The decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. North American B. Trust*, 122 F. 2d 545, rendered on the same

day as the *Chase Nat. Bank* decision, makes it clear that if the *Chase Nat. Bank* case had involved even a limited power to change investments, the decision in that case would have gone the other way. Indeed petitioner recognizes as much, for it challenges the *North American B. Trust* decision as wrong (Pet. 38), and does not urge that it is distinguishable, as it is not, from the instant case.

3. Courts that have previously passed on the question have not entertained any doubt that investment trusts meet the other test applied in the *Morrissey* case, the corporate form test. *Commissioner v. Chase Nat. Bank, supra*; *Commissioner v. North American B. Trust, supra*; *Commissioner v. Buckley, supra*; *Hamilton Depositors Corp v. Nichols*, 111 F. 2d 385 (C. C. A. 10th). That such trusts do, appears to have been assumed without discussion.

Petitioner argues (Br. 21-26) first, that the corporate form test is merely a secondary test, since the five factors which this Court enumerated in the *Morrissey* case, namely, continuity, centralized management, security from termination or interruption by the death of owners of beneficial interest, facilitation of transfer of beneficial interests and the introduction of large numbers of participants without affecting continuity of the enterprise, and limitations on liability, are as often found in trusts as in corporations; and,

second, that the trusts here do not, in any event, meet that test. While the fact that all trusts have some characteristics common to corporations may make the business test the more important, petitioner's argument (Br. 24-26) erroneously assumes that the *Morrissey* case requires that the organization and operation of the trust must conform in every detail to that of a corporation, a situation that of necessity will not exist as to any trust, and disregards the fact that to the extent the corporate form test is of significance it requires a determination not of the extent to which the particular trust has the characteristics of a trust, but the extent to which it has features resembling those of a corporation.

As the court below pointed out (R. 73-74), these trusts had corporate attributes, and moreover they lacked many of the features of a pure trust. Petitioner does not deny the possession of these corporate attributes (Pet. 25-26) except for that of limited liability. Petitioner's contention that the liability of beneficiaries was not limited is rested on the failure of the agreements expressly to limit liability. However, normally a trust beneficiary is not personally liable for the debts of the trust (*Restatement of the Law of Trusts*, Vol. 2, §§ 274-277, pp. 842-847; Scott, *Law of Trusts* (1939), Vol. 2, §§ 274-277, pp. 1540-1544), as this Court recognized in *Helvering v. Combs*,

296 U. S. 365, a companion case to *Morrissey v. Commissioner*, *supra*, where it referred to the limited liability of the associates although no express limitation of liability was shown by the record. For other cases holding trusts taxable as associations in the absence of express limitations of liability, see *Nashville Trust Co. v. Cetros*, 120 F. 2d 157, 159, 122 F. 2d 326 (C. C. A. 6th), certiorari denied, 314 U. S. 680; *Del Mar Addition v. Commissioner*, 113 F. 2d 410, 411 (C. C. A. 5th); *Kilgallon v. Commissioner*, 96 F. 2d 337 (C. C. A. 7th), certiorari denied, 305 U. S. 622; *Bert v. Helvering*, 92 F. 2d 491 (App. D. C.); *Huron River Syndicate v. Commissioner*, 44 B. T. A. 859, 864; *Jordan Creek Placers v. Commissioner*, 43 B. T. A. 131, 135; and compare *Burk-Wagoner Assn. v. Hopkins*, 269 U. S. 110, holding a partnership taxable as an association.

These trusts are unlike pure trusts in many respects. The sponsors are not trustors but vendors of securities; the trustees are not true trustees but intermediaries; the certificate holders are not ordinary beneficiaries but were purchasers of interests in corporate securities; the trust assets were not donated by trustors but were contributed by the certificate holders in the same manner that corporate shareholders provide their corporation with capital.

CONCLUSION

The decision below is correct and presents no conflict. The petition for writs of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 1001. DEFINITIONS.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * * *

(6) The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

* * * * *

(8) The term "stock" includes the share in an association, joint-stock company, or insurance company.

(9) The term "shareholder" includes a member in an association, joint-stock company, or insurance company.

* * * * *

(b) The terms "includes" and "including" when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined.

Section 901 (a) (1), (2), (6), (8), and (9), and (b) of the Revenue Act of 1938, c. 289, 52 Stat. 447, and Section 3797 (a) (1), (3), (6), (7), and (8) and (b) of the Internal Revenue

Code are identical with Section 1001 (a) (1), (2), (6), (8), and (9), and (b) of the Revenue Act of 1936, *supra*.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 1001-1. *Classification of taxables.*—For the purpose of taxation the Act makes its own classification and prescribes its own standards of classification. Local law is of no importance in this connection. Thus a trust may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its nature or its activities. (See article 1001-3.) The term "partnership" is not limited to the common law meaning of partnership, but is broader in its scope and includes groups not commonly called partnerships. (See article 1001-4.) The term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company, and certain kinds of partnerships. (See articles 1001-2 and 1001-4.) The definitions, terms, and classifications, as set forth in section 1001, shall have the same respective meaning and scope in these regulations.

ART. 1001-2. *Association.*—The term "association" is not used in the Act in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted

by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an "investment" trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Act, a trust or an estate, or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association.

ART. 1001-3. *Association distinguished from Trust.*—The term "trust," as used in the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph is an

arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages. The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.

If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Act as a corporation. However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer," the use of a "seal," the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws," the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Act disregards the technical distinction between a trust agreement (or declara-

tion) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

* * * * *

ART. 1001-9. *Fiduciary*.—“Fiduciary” is a term which applies to persons that occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators. A fiduciary for income tax purposes is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another, as in the case of receivers. A committee or guardian of the property of an incompetent person is a fiduciary.

Articles 901-1, 901-2, 901-3, and 901-9 of Treasury Regulations 101, promulgated under the

Revenue Act of 1938 and Sections 19.3797-1, 19.3797-2, 19.3797-3, and 19.3797-9 of Treasury Regulations 103, promulgated under the Internal Revenue Code, are identical with the above quoted articles of Regulations 94.